TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 640

THE UNITED STATES OF AMERICA, APPELLANT

vs.

CAROLENE PRODUCTS COMPANY

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS

FILED DECEMBER 16, 1937

SUPREME COURT OF THE UNITED STATES

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THE UNITED STATES OF AMERICA, APPELLANT

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INDEX

1 [Caption omitted.]

3 In United States District Court for the Southern District of Illinois, Southern Division

Docket No. 3489

No. Pre. Pro. Howard L. Doyle, U. S. Attorney.

Indictment Filed June 19, 1935

The Grand Jurors of the United States of America, impaneled, sworn, and charged in the District Court of the United States of America, within and for said Southern Division of the Southern District aforesaid, at the term aforesaid, of the court aforesaid, in the year of our Lord Nineteen Hundred Thirty-five, and inquiring within and for said Southern Division of said Southern District, upon their oath present that Carolene Products Company, a corporation, on, to wit, the First day of December, in the year of our Lord Nineteen Hundred Thirty-four, at, to wit, Litchfield, in the County of Montgomery, in the State of Illinois, in the said Southern Division of the Southern District aforesaid, and within the jurisdiction of this court, did, then and there, wilfully, knowingly, fraudulently and unlawfully ship in interstate commerce from the said Litchfield, in the said County of Montgomery, in the said State of Illinois, in the said Southern Division of the Southern District aforesaid, to General Grocer Co. at the City of St. Louis, in the State of Missouri, over the roads and public highways of said State of Illinois and said State of Missouri, by motor truck, then and there owned and operated by Schmidt Trucking Service, a common carrier, a certain adulterated article of food injurious to the public health, to wit, certain filled milk, to wit, three hundred cases, each containing forty-eight, fourteen and one-half ounce cans of "Milnut,"
4 being then and there a product of condensed and concentrated skimmed milk, to which there had theretofore been added, and which there had theretofore been blended and compounded, a certain fat and oil other than milk fat, to wit, cocoanut oil and fat, so that the resulting product, to wit, the said "Milnut" then and there, to wit, at the time and place first aforesaid, was in imitation of and semblance of, to wit, milk, cream, skimmed milk, condensed milk, and concentrated milk, and the said filled milk, to wit, the said "Milnut" not then and there being a distinct proprietary food compound, not readily mistaken in taste for milk or cream, or for evaporated, condensed, or powdered milk or cream, and not being then and there a compound prepared and designed for feeding infants and young children, and customarily used on the order of a physician, and not being then and there packed in individual cans containing not more than sixteen and one-half ounces, and bearing a label in bold type, that the content is to be used only for said purpose, and not being then

and there shipped in interstate commerce as aforesaid, exclusively to physicians, wholesale and retail druggists, orphan asylums, child welfare associations, hospitals, and similar institutions, and generally disposed of by them, which said shipment in interstate commerce, in manner and form aforesaid, of the said filled milk, to wit, the said "Milnut," was then and there unlawful and prohibited, and in violation of the Act of Congress, approved March 4, 1933, entitled, "An Act to prohibit the shipment of filled milk in interstate or foreign commerce;" contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

5 Second Count:

And the Grand Jurors aforesaid, inquiring as aforesaid, upon their oath aforesaid, do further present that Carolene Products Company, a corporation, on, to wit, the Twenty-seventh day of December, in the year of our Lord Nineteen Hundred Thirty-four, at, to wit, Litchfield, in the County of Montgomery, in the State of Illinois, in the said Southern Division of the Southern District aforesaid, and within the jurisdiction of this court, did, then and there, wilfully, knowingly, fraudulently and unlawfully deliver to Buske Lines, Inc., a corporation, for shipment in interstate commerce from the said Litchfield, in the said County of Montgomery, in the said State of Illinois, in the said Southern Division of the Southern District aforesaid, to N. Comensky Gro. Co., at the City of St. Louis, in the State of Missouri, a certain adulterated food product injurious to the public health, to wit, certain filled milk, to wit, fifty cases, each case containing forty-eight, fourteen and one-half ounce cans of "Carolene," a product of condensed and concentrated skimmed milk, to which there had theretofore been added, and with which there had theretofore been blended and compounded, a certain fat and oil other than milk fat, to wit, a cocoanut oil and cocoanut fat, so that the resulting product, to wit, the said "Carolene," then and there, to wit, at the time and place first aforesaid, was in imitation of and semblance of, to wit, milk, cream, skimmed milk, condensed milk, and concentrated milk, the said filled milk, to wit, the said "Carolene" not then and there being a distince proprietary food compound not readily mistaken in taste for milk or cream, or for evaporated, condensed, or powdered milk or cream, and not being then and there a compound prepared and designed for feeding infants and young children, and customarily used on the order of physicians, and not being then and there packed in individual cans containing not more than sixteen and one-half ounces, and bearing a label in bold type,

6 that the content is to be used only for said purpose, and not being then and there shipped in interstate commerce in manner and form aforesaid, exclusively to physicians, wholesale and retail druggists, orphan asylums, child welfare associations, and generally disposed of by them, which said delivery for shipment in interstate commerce as aforesaid of the said filled milk, to wit, the said

"Carolene" was then and there unlawful and prohibited and in violation of the Act of Congress, approved March 4, 1933, entitled, "An Act to prohibit the shipment of filled milk in interstate or foreign commerce"; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

HOWARD L. DOYLE,
United States Attorney.

(Endorsed:) A True Bill. W. E. Deming, Foreman.
[File endorsement omitted.]

9 In United States District Court

Criminal No. 3489

UNITED STATES

vs.

CAROLENE PRODUCTS COMPANY

Motion to quash indictment

Filed June 26, 1935

Now comes the Carolene Products Company, defendant in the above entitled cause, by its attorney, George N. Murdock, and moves the court to quash each and every count of said indictment on the following grounds:

1. That the same matters and the same cause of action has heretofore been before and been considered by this court in the form of an information filed in this court June 20, 1931, No. 2234 Criminal, to which information a demurrer was filed admitting the facts as set forth in said information, but charging that the things therein set out were not sufficient in law to require defendant to make an answer thereto because—

(a) Said Act under which said information was brought was unconstitutional and void in that it deprived defendant of its property without due process of law, in violation of the 5th Amendment of the Constitution of the United States.

(b) That said statute was unconstitutional and void in that the legislaive branch had assumed and usurped the powers of the judicial branch of the government in violation of the Constitution of the United States.

(c) In that said statute was unconstitutional and void in that it was an unjust and arbitrary discrimination and classification against the product manufactured by defendant.

(d) In that said statute denied defendant equal protection of the laws of the United States.

(e) That said statute was unconstitutional and void in that it was a conclusive presumption denying defendant the right to introduce proof and evidence, assuming the province of both court and jury.

(f) The said statute was unconstitutional and void in that under the guise of regulating interstate commerce it assumed the power which by the Constitution of the United States is retained by the individual states.

That said demurrer was fully argued and considered and sustained by this court, said case being United States vs. Carolene Products Company, reported in 7 Federal Supplement 500, and that the matters and facts set out in the present indictment are res adjudicata.

2. That the statute under which said indictment is brought was fully considered by the court in the above named decision and having been so considered the decision in that case is now binding upon the court in this case, all parties being the same, the products being the same, and the statute under which this case is brought, being the same.

3. That the bringing of the indictment in this case is in effect an attempt to require this court to grant a re-hearing after the close of the term and on a case which was decided by this court approximately a year and a half ago, and under which decision defendant has built up and acquired extensive property rights.

Wherefore, defendant prays judgment of the said indictment, and that the same may be quashed.

GEORGE N. MURDOCK,
Attorney for Defendant,
Suite 1112 Harris Trust Bldg., Chicago, Illinois.

Resident Attorney for Service:
DENNIS J. GODFREY,
Litchfield, Ill.

[*Duly sworn to by George N. Murdock; jurat omitted in printing.*]
[File endorsement omitted.]

12 In United States District Court

[Title omitted.]

Order overruling motion to quash

July 7, 1937

Come now the parties to this cause by their respective attorneys, and the court having heretofore heard the arguments of said attorneys on the motion to quash the indictment herein and now being fully advised in the premises, it is ordered by the court that the said motion to quash the indictment be and is hereby overruled.

14 In United States District Court

[Title omitted.]

Demurrer

Filed July 12, 1937

Comes now the Carolene Products Company, a corporation, defendant, by personal appearance through its attorney, George N. Murdock, and says that the indictment, and each and every count thereof, and the matters and things therein contained, in manner and form as the same are therein set forth, are not sufficient in law to require it to make answer thereto, and this it is ready to verify; Wherefore it prays judgment of the court here if it ought to be required to make answer unto the said indictment or to any of the counts thereof, and prays that the same may be dismissed.

And the defendant further assigns the following causes of demurrer to the said information and each and every count thereof:

1. The indictment charges a violation of the Act of Congress approved March 4, 1923, entitled "An Act to prohibit shipment of Filled Milk in Interstate Commerce," the said statute being unconstitutional and void in that it deprives defendant of its property without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

2. Said statute is unconstitutional and void in that in its passage the legislative branch of the government has assumed and usurped the powers and duties of the judicial branch of the government in violation of the Constitution of the United States.

15 3. The said statute is unconstitutional and void in that it is an unjust and arbitrary discrimination and classification against the product manufactured by defendant.

4. The said statute is unconstitutional and void in that it denies defendant the equal protection of the laws of the United States in violation of the Constitution of the United States.

5. The said statute is unconstitutional and void in that it is a conclusive presumption which denies defendant the right to introduce proof and evidence, and assumes the province of both the court and jury, in violation of the Constitution of the United States.

6. Said statute is unconstitutional and void in that under the guise of regulating interstate commerce with respect to a certain product it has enacted a statute prohibiting the interstate commerce in said product and so assumed a power which by the Constitution of the United States is retained by the individual states.

CAROLENE PRODUCTS COMPANY,
Defendant.

By CHAS. HAUSER,
President.

GEO. N. MURDOCK,
Attorney for Defendant.

[File endorsement omitted.]

17 In United States District Court

[Title omitted.]

Memorandum opinion

Filed Oct. 19, 1937

By its demurrer herein, the Defendant raises the question of the constitutionality of the Filled Milk Act (Chapter 3 "Filled Milk" Title 21 U. S. C.). In view of the exhaustive discussion of this question in the case of United States vs. Carolene Products Co., 7 Fed. Sup. 500, the Court feels it unnecessary to make an extensive record of its views. Suffice to say that the Court is satisfied with the reasoning of the late Honorable Louis FitzHenry in United States vs. Carolene Products Co., 7 Fed. Sup. 500, and for the reasons assigned in the opinion in that case, holds the "Filled Milk Act" to be unconstitutional and therefore sustains the demurrer herein.

An order will therefore be entered herein this day sustaining said demurrer and dismissing said cause.

As Springfield, Illinois, October 19, A. D. 1937.

J. LEROY ADAIR,
Judge.

[File endorsement omitted.]

19 In United States District Court for the Southern District of Illinois, Southern Division

Docket No. 3489

UNITED STATES OF AMERICA

vs.

CAROLENE PRODUCTS COMPANY

Order sustaining demurrer, etc.

Filed Oct. 19, 1937

This cause now coming on to be heard on the Demurrer of the Defendant to the indictment herein, and the Court having now heard arguments of counsel, and being fully advised in the premises, doth

Order, adjudge, and decree that the said demurrer be, and the same is, hereby sustained and this cause dismissed; and the Court doth further hereby certify that his decision sustaining the said demurrer of the Defendant in this cause is based solely upon his construction of the statute involved therein, (Chapter 3 "Filled Milk" Title 21, U. S. C.), and his opinion that the same is unconstitutional.

An exception is granted to the Plaintiff from the Court's ruling sustaining said demurrer and dismissing this cause.

J. LEROY ADAIR,
Judge.

ENTER:
October 19, A. D. 1937.
[File endorsement omitted.]

21 In United States District Court

[Title omitted.]

Petition for appeal

Filed November 18, 1937

Comes now the United States of America, plaintiff herein, and states that on the 19th day of October 1937, a demurrer of the defendant, Carolene Products Company, a corporation, to each and every count of the indictment herein was by the Court sustained, and the plaintiff feeling aggrieved at the ruling of said District Court in sustaining said demurrer, prays that it may be allowed an appeal to the Supreme Court of the United States for a reversal of said judgment and order, and that a Transcript of the record in this cause duly authenticated may be sent to said Supreme Court of the United States.

Petitioner submits and presents to the Court herewith a statement showing the basis of jurisdiction of the Supreme Court to entertain an appeal in said cause.

UNITED STATES OF AMERICA,
HOWARD L. DOYLE,
United States Attorney,
Southern District of Illinois.

[File endorsement omitted.]

23 In United States District Court

[Title omitted.]

Assignments of error

Filed November 18, 1937

Comes now the United States of America, by Howard L. Doyle, United States Attorney for the Southern District of Illinois, and avers that in the record proceedings and judgment herein there is manifest error and against the just rights of the said plaintiff in this, to wit:

1. That the Court committed material error against plaintiff in sustaining the demurrer of the defendant, Carolene Products Company, a corporation, to each and every count of the indictment.

2. That the Court committed material error against plaintiff in holding that the Filled Milk Act, Secs. 61–63, Title 21, United States Code, under which each count of the indictment is drawn, is unconstitutional.

3. That the Court committed material error against plaintiff in holding that the Filled Milk Act, Secs. 61–63, Title 21, United States Code, under which each count of the indictment is drawn, is unconstitutional as contravening the due process clause of the Fifth Amendment.

4. That the Court committed material error against plaintiff in holding that the Filled Milk Act, Secs. 61–63, Title 21, United States Code, under which each count of the indictment is drawn, is unconstitutional as a regulation of matters within the jurisdiction of the various states under the guise of regulating interstate commerce.

HOWARD L. DOYLE,
United States Attorney,
Southern District of Illinois.

[File endorsement omitted.]

25 In United States District Court

[Title omitted.]

Order allowing appeal to the Supreme Court of the United States

Filed November 18, 1937

This cause having come on this day before the Court on the Petition of the United States of America, plaintiff herein, praying an appeal to the Supreme Court of the United States for a reversal of the judgment herein sustaining a demurrer of the defendant, Carolene Products Company, a corporation, to each and every count of the indictment in said cause, and that a duly certified copy of the Record in said cause be transmitted to the Clerk of the Supreme Court of the United States, and the Court having heard and considered said motion, together with plaintiff's statement showing the basis of the jurisdiction of the Supreme Court to entertain an appeal in said cause, the same having been duly filed with the Clerk of this Court, It is, therefore, by the Court, Ordered and Adjudged that the plaintiff herein, the United States of America, be, and it is hereby, allowed an appeal from the order and judgment of this Court, in sustaining the demurrer of the defendant to the indictment, to the Supreme Court of the United States, and that a duly certified copy

of the record of said cause be transmitted to the Clerk of the Supreme Court.

It is further Ordered that the United States of America be, and it is hereby, permitted a period of forty days from the date hereof in which to file and docket said appeal in the Supreme Court of the United States.

Dated at Springfield, Illinois, this 18th day of November 1937.

By the Court:

(Signed) CHAS. G. BRIGGLE, *Judge.*

[File endorsement omitted.]

28 In United States District Court

[Title omitted.]

Praecipe for transcript of record

Filed November 20, 1937

To the CLERK, UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF ILLINOIS:

The appellant hereby directs that in preparing transcript of the record in this cause in the United States District Court for the Southern District of Illinois in connection with its appeal to the Supreme Court of the United States you include the following:

1. Indictment.
2. Demurrer.
3. Opinion.
4. Judgment sustaining demurrer.
5. Petition for Appeal to the Supreme Court.
6. Statement of Jurisdiction of Supreme Court.
7. Assignments of error.
8. Order Allowing Appeal.
9. Notice of service on appellee of Petition for Appeal, Order Allowing Appeal, Assignment of Errors, and Statement as to Jurisdiction.
10. Citation.
11. Praecipe.

(Signed) HOWARD L. DOYLE,
United States Attorney,
Southern District of Illinois.

Service of the foregoing Praecipe for Transcript of Record is acknowledged this 19 day of November 1937.

(Signed) GEO. N. MURDOCK,
Attorney for Defendant.

[File endorsement omitted.]

30 In United States District Court

[Title omitted.]

Appellee's praecipe for record

Filed Nov. 24, 1937

To the CLERK OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS, SOUTHERN DIVISION:

You are hereby requested to incorporate into the transcript of the record to be filed in the United States Supreme Court, on the appeal heretofore allowed in this case, in addition to the portions of the record indicated by the appellant herein, the following:

1. Motion of defendant to quash the indictment.
2. Order of the Court denying same.
3. Appelle's praecipe for record.

GEORGE N. MURDOCK,
Attorney for Appellee.

Received a copy of the above and foregoing praecipe this 24th day of November 1937.

HOWARD L. DOYLE,
United States Attorney,
Attorney for Appellant.

[File endorsement omitted.]

33 [Citation in usual form showing service on Geo. N. Murdock, filed Nov. 20, 1937, omitted in printing.]

34 [Clerk's certificate to foregoing transcript omitted in printing.]

35 In Supreme Court of the United States

Statement of points relied upon and designation of entire record for printing

Filed Dec. 29, 1937

Pursuant to Rule XIII, Paragraph 9, of this Court, appellant states that it intends to rely upon all of the points in its assignment of errors.

Appellant deems the entire record, as filed in the above entitled cause, necessary for the consideration of the points relied upon.

STANLEY REED,
Solicitor General.

Service acknowledged December 27, 1937.

GEORGE N. MURDOCK,
Counsel for Appellee.

[File endorsement omitted.]

[Endorsement on cover:] File No. 42121. S. Illinois, D. C. U. S. Term No. 640. The United States of America, Appellant, vs. Carolene Products Company. Filed December 16, 1937. Term No. 640 O. T. 1937.

U. S. GOVERNMENT PRINTING OFFICE: 1938

In the United States District Court for the Southern District of Illinois

No. 3489

UNITED STATES OF AMERICA, PLAINTIFF

v.

CAROLENE PRODUCTS COMPANY, A CORPORATION, DEFENDANT

STATEMENT OF JURISDICTION

Filed November 18, 1937

In compliance with Rule 12 of the Supreme Court of the United States, as amended, the United States of America submits herewith its statement showing the basis of the jurisdiction of the Supreme Court to entertain an appeal in this cause:

A. The statutory jurisdiction of the Supreme Court to review by direct appeal the judgment complained of is conferred by Title 18, Section 682, of the United States Code, otherwise known as the Criminal Appeals Act, and by Section 345, Title 28, of the United States Code.

B. The statute of the United States, the validity of which is involved herein is the Act of March 4,

34356—37——1

1923, c. 262, 42 Stat. 1486, 1487, (U. S. C. Title 21, Secs. 61–63), which sections read as follows:

SEC. 61. Filled milk; definitions. Whenever used in sections 62 and 63 of this title—

(a) The term "person" includes an individual, partnership, corporation, or association;

(b) The term "interstate or foreign commerce" means commerce (1) between any State, Territory, or possession, or the District of Columbia, and any place outside thereof; (2) between points within the same State, Territory, or possession, or within the District of Columbia, but through any place outside thereof; or (3) within any Territory or possession, or within the District of Columbia; and

(c) The term "filled milk" means any milk, cream, or skimmed milk, whether or not condensed, evaporated, concentrated, powdered, dried, or desiccated, to which has been added, or which has been blended or compounded with, any fat or oil other than milk fat, so that the resulting product is in imitation or semblance of milk, cream, or skimmed milk, whether or not condensed, evaporated, concentrated, powdered, dried, or desiccated. This definition shall not include any distinctive proprietary food compound not readily mistaken in taste for milk or cream or for evaporated, condensed, or powdered milk, or cream where such compound (1) is prepared and designed for feeding infants and young children and customarily used on the order of a physician;

(2) is packed in individual cans containing not more than sixteen and one-half ounces and bearing a label in bold type that the content is to be used only for said purpose; (3) is shipped in interstate or foreign commerce exclusively to physicians, wholesale and retail druggists, orphan asylums, child-welfare associations, hospitals, and similar institutions and generally disposed of by them. (Mar. 4, 1923, c. 262, § 1, 42 Stat. 1486).

SEC. 62. Same; manufacture, shipment, or delivery for shipment in interstate or foreign commerce prohibited. It is declared that filled milk, as herein defined, is an adulterated article of food, injurious to the public health, and its sale constitutes a fraud upon the public. It shall be unlawful for any person to manufacture within any Territory or possession, or within the District of Columbia, or to ship or deliver for shipment in interstate or foreign commerce, any filled milk (Mar. 4, 1923, c. 262, § 2, 42 Stat. 1487).

SEC. 63. Same; penalty for violations of law; acts, omissions, and so forth, of agents. Any person violating any provision of sections 61 and 62 of this title shall upon conviction thereof be subject to a fine of not more than $1,000 or imprisonment of not more than one year, or both. When construing and enforcing the provisions of said sections, the act, omission, or failure of any person acting for or employed by any individual, partnership, corporation, or associa-

tion, within the scope of his employment or office, shall in every case be deemed the act, omission, or failure, of such individual, partnership, corporation, or association, as well as of such person (Mar. 4, 1923, c. 262, § 3, 42 Stat. 1487).

C. The judgment of the District Court sought to be reviewed was entered on October 19, 1937, and an application for appeal was filed on November 18, 1937, and is presented to the District Court herewith: On this the 18th day of November, 1937.

The indictment in this case is in two separate counts each of which is based upon Sections 61–63 of Title 21 of the United States Code, and alleges that the defendant, Carolene Products Company, a corporation, wilfully, knowingly, fraudulently and unlawfully shipped in interstate commerce, to N. Comensky Grocery Company and General Company of St. Louis, Missouri, an adulterated article, to wit, filled milk, in violation of the Filled Milk Act of March 4, 1923, which shipments were not made to doctors, druggists, hospitals, orphan asylums, or similar institutions.

A demurrer to the indictment was filed by the defendant, Carolene Products Company, and was sustained by the District Court.

The Court based its decision solely upon the ground that the Filled Milk Act (U. S. C. Title 21, Secs. 61–63), upon which the indictment was founded, is unconstitutional in that it is in violation of the due process clause of the Fifth Amend-

ment and that it constitutes a regulation of local matters under the guise of regulating interstate commerce. Its opinion referred to and adopted the reasoning of Judge FitzHenry of the same District in an opinion in a previous case between the same parties reported in 7 F. Supp. 500.

That the question decided by the District Court is substantial is indicated by the decisions of the Court in *Hebe* v. *Shaw*, 240 U. S. 297, and *Brooks* v. *United States*, 267 U. S. 432. In *Hebe* v. *Shaw*, *supra*, the court had under consideration a statute of the State of Ohio similar to the Filled Milk Act prohibiting the sale of skimmed milk and held that it was not in violation of the due process clause of the Fourteenth Amendment. In *Brooks* v. *United States*, *supra*, the Court stated (p. 436):

> Congress can certainly regulate interstate commerce to the extent of forbidding the use of such commerce as an agency to promote immorality, dishonesty, or the spread of any evil or harm to other states from the state of origin. Doing this it is merely exercising the police power for the benefit of the public within the field of interstate commerce.

The following decisions are believed to sustain the jurisdiction of the Supreme Court:

United States v. *Curtiss-Wright Corp.*, 299 U. S. 304.
United States v. *Hastings*, 296 U. S. 188.
United States v. *Chambers*, 291 U. S. 217.
United States v. *Sprague*, 282 U. S. 716.

Appended hereto is a copy of the opinion of the Court filed October 19, 1937, together with the earlier opinion of that Court in *United States* v. *Carolene Products Company*, 7 F. Supp. 500.

Respectfully submitted.

STANLEY REED,
Solicitor General.

HOWARD L. DOYLE,
United States Attorney.

Indorsed: Filed Nov. 18, 1937.

G. W. SCHWANER, *Clerk.*

In the District Court of the United States for the Southern District of Illinois, Southern Division

Docket No. 3489. Demurrer to Indictment

UNITED STATES OF AMERICA

vs.

CAROLENE PRODUCTS COMPANY

MEMORANDUM OPINION

By its demurrer herein, the Defendant raises the question of the constitutionality of the Filled Milk Act (Chapter 3 "Filled Milk" Title 21 U. S. C.). In view of the exhaustive discussion of this question in the case of *United States* v. *Carolene Products Co.*, 7 Fed. Sup. 500, the Court feels it unnecessary to make an extensive record of its views. Suffice to say that the Court is satisfied with the reasoning of the late Honorable Louis FitzHenry in *United States* v. *Carolene Products Co.*, 7 Fed. Sup. 500, and for the reasons assigned in the opinion in that case, holds the "Filled Milk Act" to be unconstitutional and therefore sustains the demurrer herein.

An order will therefore be entered herein this day sustaining said demurrer and dismissing said cause.

At Springfield, Illinois, October 19, A. D. 1937.

J. LEROY ADAIR, *Judge.*

OPINION OF THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS, SOUTHERN DIVISION, IN THE CASE OF "UNITED STATES V. CAROLENE PRODUCTS COMPANY," REPORTED IN 7 F. SUPP. 500

This is an information against defendant, a corporation, charging it in the first count with having unlawfully shipped, in interstate commerce, from Litchfield, Illinois, to a consignee at Muncie, Indiana, over the lines and routes of the Railway Express Agency, "a certain adulterated article of food injurious to the public health, to wit, certain filled milk, to wit, one case of 'Carolene,' being then and there a product of condensed and concentrated skim milk, to which there had theretofore been added and with which there had theretofore been blended and compounded a certain fat and oil other than milk fat, to wit, the said 'Carolene,' then and there, to wit, at the time and place aforesaid, was an imitation or semblance of, to wit, milk, cream, skim milk, condensed milk and concentrated milk, to wit, the said filled milk, to wit, the said 'Carolene' not then and there being a distinct proprietary food compound," then negativing the exception as to infants' food, charging, "said shipment in interstate commerce as aforesaid of the said filled milk, to wit, the said 'Carolene' was then and there unlawful and prohibited and in violation of the Act of Congress approved March 4, 1923, entitled, 'An Act to Prohibit the Shipment of Filled Milk in Interstate or Foreign Commerce';

contrary to the form of the statute," etc. (U. S. C. A., Title 21, §§ 61, 62, 63.)

The information contains three counts, the second and third of which are substantially the same as the first. The gist of the information is that defendant is the manufacturer of a food product, being a compound of skimmed milk and cocoanut oil, and shipped some of its product, in interstate commerce, from Litchfield, Illinois, to Muncie, Indiana, in violation of the so-called "Filled Milk" Act.

Defendant has demurred to the information, and charges that the statute under which the prosecution is had is unconstitutional and void for the following reasons:

1. The statute creates a conclusive presumption that (1) filled milk is an adulterated article; (2) it is injurious to the public health: (3) that its sale constitutes a fraud upon the public; and thereby denies defendant the right to take issue upon these material facts and to prove it is not an adulterated article, under the laws of the United States; that it is not in fact injurious to the public health, and that its sale in no way constitutes a fraud upon the public; and thereby deprives defendant of its property without due process of law, in violation of the Fifth Amendment to the Constitution.

2. That the statute is invalid because it prohibits the shipment of defendant's product in interstate

commerce, but does not forbid the transportation in interstate commerce of mixtures and compounds of milk and mineral or vegetable fats in imitation or semblance of butter, and is therefore arbitrary and unreasonable and deprives defendant of its property without due process of law.

3. Because the statute is invalid in that Congress in adopting it assumed the powers of the Judicial Branch of the Government as defined by the Constitution of the United States.

4. The statute is unconstitutional because under the power given to Congress by the Constitution to regulate interstate commerce, it has prescribed for the actual prohibition in interstate commerce of an article which is in itself healthful and nutritious.

5. Because defendant is denied a hearing to which it is entitled under the Pure Food and Drugs Act, and now is provided by the so-called "Filled Milk" Act; that before defendant can be deprived of its rights it must have notice and a reasonable opportunity to be heard in defense of its rights.

Section 1 of the so-called "Filled Milk" Act, paragraph (a) defines the term "person"; (b) describes "interstate or foreign commerce"; and (c) defines the term "filled milk" as meaning any milk, cream, or skimmed milk, whether condensed or otherwise, to which has been added, or which has been blended or compounded with, any fat or oil other than milk fat, so that the resulting product is in imitation or semblance of milk, cream, or

skimmed milk, whether or not condensed, evaporated, concentrated, powdered, dried or desiccated. The paragraph contains an exception covering and describing so-called infant foods.

Section 2 declares filled milk, as defined, to be an adulterated article of food, injurious to the public health, and its sale constitutes a fraud upon the public; that it shall be unlawful for any person to manufacture it within any Territory or possession or the District of Columbia, or to ship the product or deliver it for shipment in interstate or foreign commerce.

In other words, the act recognizes milk, cream, or skimmed milk, condensed or otherwise, to be entirely legitimate and innocuous articles and proper commodities for interstate commerce, but when the well-known article of skimmed milk has had some harmless vegetable oil or fat added to it, then becomes adulterated, is injurious to the public health, and a fraud upon the public, notwithstanding the recognition of it by the Pure Food and Drugs Law as a wholesome article of food, entitled to enter interstate commerce, provided it is labeled and branded so that a purchaser, in actual commerce, may know exactly what it is and its nature. (U. S. C. A. Title 21, § 10, Act of June 20, 1906, c. 3915, § 8.)

Section 7 of the Pure Food and Drugs Act of 1906 (U. S. C. A. Title 21, § 8), in force at the time

of the passage of the so-called "Filled Milk" Act, defines adulterated articles as follows:

> For the purposes of sections 1 to 15, inclusive, of this title, an article shall be deemed to be adulterated:
>
> Drugs. * * *
>
> Confectionary. * * *
>
> Food. In the case of food:
>
> *Injurious mixtures.*—First. If any substance has been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength.
>
> *Substitutes.*—Second. If any substance has been substituted wholly or in part for the article.
>
> *Valuable constituents abstracted.*—Third. If any valuable constituent of the article has been wholly or in part abstracted.
>
> *Damage or inferiority concealed.*—Fourth. If it be mixed, colored, powdered, coated, or stained in a manner whereby damage or inferiority is concealed.
>
> *Deleterious ingredients; preservatives in shipment conditionally excepted.*—Fifth. If it contain any added poisonous or other added deleterious ingredient which may render such article injurious to health. When in the preparation of food products for shipment they are preserved by any external application applied in such manner that the preservative is necessarily removed mechanically, or by maceration in water, or otherwise, and directions for the removal of said preservative shall be printed on the

covering or the package, the provisions of sections 1 to 15, inclusive, of this title shall be construed as applying only when said products are ready for consumption.

Animal or vegetable substance unfit for food; products of animals diseased or having died otherwise than by slaughter.—Sixth. If it consists in whole or in part of a filthy, decomposed, or putrid animal unfit for food, whether manufactured or not, or if it is the product of a diseased animal, or one that has died otherwise than by slaughter.

The later act (Act of March 4, 1923) contains no express provision with reference to repeal of former statutes or preventing it from operating upon sections 7 and 8 of the Act of June 30, 1906 (U. S. C. A., Title 21, secs. 8 and 10). The last paragraphs of the latter section expressly exclude from the operation of the other provisions of the Pure Food and Drugs Law:

* * * mixtures or compounds which may be now or from time to time hereafter known as articles of food, under their own distinctive names, and not an imitation of or offered for sale under the distinctive name of another article, if the name be accompanied on the same label or brand with a statement of the place where the said article has been made, manufactured, or produced.

Second. In the case of articles labeled, branded, or tagged so as to plainly indicate

> that they are compounds, imitations, or blends, and the word "compound," "imitation," or "blend," as the case may be, is plainly stated on the package in which it is offered for sale. The term blend as used herein shall be construed to mean a mixture of like substances, not excluding harmless coloring and flavoring ingredients used for the purpose of coloring and flavoring only. * * *

The passage of the Act of March 4, 1923, certainly repealed those sections, so far as the subject of "filled milk" is concerned, regardless of its effect upon other subjects. It was undoubtedly the intention of Congress to single out skimmed milk, and prohibit its transportation in interstate commerce, if anything wholesome, healthful, or otherwise be added to it, declaring it to be injurious to the public health, adulterated, and a fraud upon the public. It is common knowledge that skimmed milk constitutes about 95 per cent of the entire milk production.

The constitutionality of the Filled Milk Act is attacked and we naturally look to the reports of the committees of Congress and the debates to ascertain the objects and purposes of the legislation. *Duplex Printing Press Co.* v. *Deering et al.*, 254 U. S. 443, 41 S. Ct. Rep. 172. Some excerpts from the report of the Committee on Agriculture and Forestry of the Senate upon the measure, when the bill was being considered by that body,

are very enlightening and will be found in the margin.[1]

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[1] (Report of Committee on Agriculture and Forestry, Senate, Jan. 3, 1923; 67th Congress, 4th Session, Report 987.)

"It is a compound of skimmed milk and cocoanut oil. The manufacturers buy the whole milk, separate the butter fat, and sell the latter for cream or use it in the manufacture of butter. The skimmed milk is then mixed with from 3 to 4 percent cocoanut oil, and this mixture is then reduced by evaporation to about half its bulk. The cocoanut oil is reduced in bulk very little, if any, by the process of evaporation, so that when the compound is ready for canning it consists of skimmed milk reduced to about half its bulk, and, as the cocoanut oil was not reduced in the process of evaporation, from 6 to 8 percent of the oil. The compound is an exact imitation of evaporated milk, in color, consistency, smell, and taste and the difference between it and evaporated milk can only be ascertained by chemical analysis. The compound can be manufactured for less than half of the cost of evaporated milk.

Under the head of "Method of Handling and Marketing," the report continues:

"The pure food and drugs act (sec. 7) provides that an article of food shall be considered adulterated 'if any substance has been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength,' or 'if any substance has been substituted wholly or in part for the article,' or 'if any valuable constituent of the article has been wholly or in part abstracted,' and shall be considered misbranded (sec. 8) 'if it be an imitation of or offered for sale under the distinctive name of another article.' However, section 8 of this act has a proviso under which the manufacturers of filled milk claim the right to manufacture it, to the effect that an article shall not be considered adulterated or misbranded 'in the case of * * * compounds * * * under their own distinctive names, and not an imitation of or offered for sale under the distinctive name of another article.'

"The manufacturers of filled milk do not label their cans as 'milk,' as that would be a violation of the act, but use

It seems that the committee had given the manufacturers of compounds affected an opportunity to appear before it, and the report recites in addition to what has heretofore been referred to, that

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such trade names as 'Hebe,' 'Carolene,' 'Majal,' 'Silver Key,' 'Enzo,' 'Nyko.' The compound is put up in the same size and style of cans as the genuine evaporated or condensed milk and is carried by the retail dealers on their shelves side by side with the genuine product. *Your committee does not doubt that the sale of filled milk as at present carried on is in violation, if not of the letter, of the spirit of the pure food and drugs act. This act cannot regulate the conduct of the retail dealer. He can buy this compound for about 3 cents per 1-pound can less than he is obliged to pay for the genuine article. Many instances were brought to the attention of your committee where retail dealers advertised the compound as 'Hebe Milk,' 'Silver Key Milk,'* etc., and investigations conducted in many of our large cities reveal that the dealers were selling the compound as being as good and better than regular evaporated milk. It was shown that the compound was largely sold in sections of cities inhabited by people unable to read the label and people of limited means.

"One of the great dangers incident to the marketing of filled milk lies in the bulk sales. The statistics for the past year show that the sale in bulk is now on the increase. When used in hotels and restaurants and for making ice cream, the consumer has no means of knowing what he is getting, and a label could not protect against fraud in such a case. *If bulk shipments should be allowed, commercial chemists may discover a method by which the compound in bulk may be refilled into cans for retail sales within the limits of a State, and thus the whole object of the legislation be frustrated.*

"In recent years scientists have discovered food elements known as vitamines which are highly essential to the growth and well-being of the human body. It has been found that such diseases as rickets, scurvy, serious eye diseases, beri-beri, and even tuberculosis, may be traced to the

among other contentions were, that the compounds are wholesome and they are actually labeled and sold by the manufacturers for what they are. The committee, referring to those claims, said:

> (2) There is no claim that the compound in and of itself is unwholesome. If used by the consumer in limited quantities, with an exact knowledge of its deficiencies, and the

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lack of vitamines in the diet; in fact, the lack of vitamines reduces the whole vitality of the body and invites disease. Our chief source of vitamines is milk, and the vitamines are found almost wholly in the butter-fat of the milk. Four distinct kinds of vitamines have been discovered. The extraction of the butter-fat from the milk seems to leave in the skimmed milk only a trace of so-called vitamine A. * * *

"Vitamines are not produced by the cow, but are found in her food and concentrated in the milk. The human body does not produce them, but must receive them in the food. It follows therefore, that a nursing mother who does not receive sufficient vitamines in her diet can not transmit healthful milk to her offspring. It is a curious fact that all vegetable oils and fats are wholly lacking in vitamines. It is a fact that there is in the United States considerable under nourishment of the population especially in our largest cities. This would appear to be due in part at least to the fact that in our preparation of food for the market we have extracted at least in part valuable mineral elements and vitamines. It is therefore all the more necessary that we supply the vitamines in the milk. Milk is the one chief food of the Nation, and no adulteration of it or substitution for it should be permitted.

"* * * Your committee is of the opinion that it is impossible to prevent fraudulent use and sale of this compound, on account of the incentive of additional profit held out to the retail dealers, and no doubt in many cases due to the fact that the retail dealers themselves do not know wherein the compound differs from the genuine evaporated milk. * * *."

[All italics ours.]

> ability to supply these deficiencies, there would be little harm in its use. But we fear that such a condition does not obtain in practice, and are convinced that the use of the compound, as it is and will be sold, unless protected, is injurious to the public health.

The Illinois situation illustrates the rights which the Supreme Court of the United States was endeavoring to protect to the States in the cases of *Hammar, U. S. Atty.,* v. *Dagenhart,* 247 U. S. 251, and *Bailey* v. *Drexel Furniture Co.,* 259 U. S. 20, 42 S. Ct. Rep. 449. In Illinois the Supreme Court has held that the particular defendant in this case is engaged in a lawful business. (*People* v. *Carolene Products Co.,* 345 Ill. 166.) In Ohio the legislature prohibited the business and the Supreme Court in *Hebe* v. *Shaw,* 248 U. S. 297, held that the State had the right to prohibit it in Ohio. The law in Illinois permits the business and the effect of the "Filled Milk" Act would be to enforce legislation not of its own enactment upon the State of Illinois. The mere fact that some states may care to exercise certain police powers, and do so, is, as a matter of law, not of binding concern upon the State which does not care to have the same law.

Without the aid of the reports of the committees and the debates of Congress, it is apparent from a mere reading of the bill it is a plain attempt on the part of Congress not only to prohibit the manufacture and shipment in interstate commerce of filled milk in the Territories and the District of

Columbia, but to prohibit the manufacture, shipping, or delivery for shipment, of it to any common carrier in interstate commerce and thereby effect the same prohibition throughout the several States. It is true that its prohibition, outside of the District of Columbia and the Territories, runs against the "shipping or delivery for shipment" of any compound in interstate commerce undoubtedly with the purpose of bringing the legislation within the constitutional grant to Congress "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;" (Constitution, Art. I, § 8, Clause 3.) In other words, it is as clear a prohibition against the transportation of the compound in interstate commerce as language can describe, and it makes any person guilty of violating its provisions subject to a fine of not to exceed $1,000, or imprisonment for not more than one year, or both.

By an examination of the committee report on the so-called "Filled Milk" Bill in the Senate, from which we have quoted above, we find that when Congress made the declaration that filled milk as therein defined "is an adulterated article of food, injurious to the public health and its sale constitutes a fraud upon the public," that it was doing so because one wholesome article of food had been added to another well-known and very common article of food, it was injurious to the public health, because it did not contain a suitable amount of vitamine A to make it especially desirable for

feeding infants and nursing mothers; that its sale constitutes a fraud upon the public because certain retailers in various large cities had been guilty of its use in unfair competition with evaporated and condensed milk. Yet the Senate committee held and made the express declaration that "there is no claim that the compound in and of itself is unwholesome;" but because of certain unfair competition on the part of local retailers in the City of Washington and in some of the large cities, in selling the compound for something just as good and better than condensed milk, that the article itself thereby became injurious to health and "a fraud upon the public."

When the matter was before the House, the Committee on Agriculture and Forestry, after its hearings, filed a report for the benefit of the House, in which Mr. Voight, the author of the bill, and for a majority of the committee (on p. 6 of his report) said:

> While the proposed bill will not prohibit the manufacture and sale of the compound within the limits of a State, the committee is of the opinion that the law prohibiting interstate shipment will suppress it, because a sufficient market cannot be found without such shipment, and also because a sufficient milk supply cannot be found in many States which would warrant in engaging in the enterprise.

And further in his evidence at the hearings (p. 13), in reply to a question by Mr. TenEyck, Mr. Voight said:

> I want to stop the manufacture and the sale of this article so far as it can be done by this form of bill. (Congressional Record, p. 7595, 67th Congress, May 24, 1922.)

It is very earnestly contended that the Congress may exert its control over interstate commerce in the shipment of common commodities to the extent of suppressing unfair competition. This was the exact question that was involved in *Hammer, U. S. Attorney* v. *Dagenhart, supra,* where the Child Labor Law was held to be unconstitutional. There, the Act of September 1, 1916, prohibiting the transportation in interstate commerce of the products of mines, or factories, in which within thirty days prior to removal children under the age of 14 were employed, or children between 14 and 16 were employed or permitted to work more than 6 days a week, upon the theory that the shipment of child made goods, because of the effect of the circulation of such goods in other states where the evil of this class of labor had been recognized by local legislation, that Congress had the power and the right to thus suppress products of child labor.

There are some states where the manufacture and sale of so-called filled milk, or food compounds, are perfectly legitimate and encouraged; there are others where they are prohibited. Such acts in-

volve the exercise of plain police powers vested in the several States and not the Federal Government. The Supreme Court, in *Hammer* v. *Dagenhart, supra,* said:

> There is no power vested in Congress to require the states to exercise their police power so as to prevent possible unfair competition. Many causes may co-operate to give one state, by reason of local laws or conditions, an economic advantage over others. The commerce clause was not intended to give to Congress a general authority to equalize such conditions. In some of the states laws have been passed fixing minimum wages for women, in others the local law regulates the hours of labor of women in various employments. Business done in such states may be at an economic disadvantage when compared with states which have no such regulations; surely, this fact does not give Congress the power to deny transportation in interstate commerce to those who carry on business where the hours of labor and the rate of compensation for women have not been fixed by a standard in use in other states and approved by Congress.
>
> The grant of power to Congress over the subject of interstate commerce was to enable it to regulate such commerce, and not to give it authority to control the states in their exercise of the police power over local trade and manufacture.
>
> The grant of authority over a purely federal matter was not intended to destroy the

> local power always existing and carefully reserved to the states in the Tenth Amendment to the Constitution.

Concluding a very enlightening discussion of the powers of Congress with reference to interstate commerce, the Court then said:

> In our view the necessary effect of this act is, by means of a prohibition against the movement in interstate commerce of ordinary commercial commodities to regulate the hours of labor of children in factories and mines within the states, a purely state authority.. (Here, the food of infants and nursing mothers and unfair competition.) Thus the act in a two-fold sense is repugnant to the Constitution. It not only transcends the authority delegated to Congress over commerce but also exerts a power as to a purely local matter to which the federal authority does not extend. The far reaching result of upholding the act cannot be more plainly indicated than by pointing out that if Congress can thus regulate matters entrusted to local authority by prohibition of the movement of commodities in interstate commerce, all freedom of commerce will be at an end, and the power of the states over local matters may be eliminated, and thus our system of government be practically destroyed.

We realize that the opinion in *Hammer* v. *Dagenhart, supra,* is a so-called 5 to 4 decision. It was filed June 3, 1918, and affirmed the judgment of the District Court in enjoining the enforcement of the

so-called "Child Labor" Law. Four years later another case came before the Supreme Court, involving what was known as the "Child Labor Tax" Law, enacted by Congress about nine months after the decision in the Hammer case. That was a revenue measure, approved February 24, 1919, and the title of the heading in the Revenue Act was "Tax on Employment of Child Labor." The act imposed a tax of 10% of the net income of a person employing child labor without distinction as to the amount of the tax between an employer who employs one child one day and one who employs a large number for the entire year and which exempts from the tax an employer who did not know the child was under the age, etc.

The Court held that it was quite apparent that the Child Labor Tax Law was designed to regulate child labor and not to collect revenue, as was manifest from its provisions; that it could not be sustained as a valid exercise of the taxing power under the Constitution merely because it was in substance a penalty for a violation of the regulations and was designated as a tax, even though the Court will sustain as a taxing measure an act which imposes a tax so excessive as to prevent the act taxed.

In discussing that law, Mr. Chief Justice Taft, in *Bailey* v. *Drexel Furniture Co.*, 259 U. S. 20, 42 S. Ct. Rep. 449, said:

> In the light of these features of the act, a court must be blind not to see that the so-

called tax is imposed to stop the employment of children within the age limits prescribed. Its prohibitory and regulatory effect and purpose are palpable. All others can see and understand this. How can we properly shut our minds to it?

In discussing the case further (p. 39) the Court said:

> The case before us cannot be distinguished from that of *Hammer* v. *Dagenhart*, 247 U. S. 251. * * * Congress there enacted a law to prohibit transportation in interstate commerce of goods made at a factory in which there was employment of children within the same ages and for the same number of hours a day and days in a week as are penalized by the act in this case. * * *.
>
> In the case at bar, Congress in the name of a tax which on the face of the act is a penalty seeks to do the same thing, and the effort must be equally futile.
>
> The analogy of the Dagenhart case is clear. The congressional power over interstate commerce is, within its proper scope, just as complete and unlimited as the congressional power to tax, and the legislative motive in its exercise is just as free from judicial suspicion and inquiry. Yet when Congress threatened to stop interstate commerce in ordinary and necessary commodities, unobjectionable as subjects of transportation, and to deny the same to the people of a state in order to coerce them into

> compliance with Congress' regulation of state concerns, the court said: this was not in fact regulation of interstate commerce, but rather that of state concerns and was invalid. So here the so-called tax is a penalty to coerce people of a state to act as Congress wishes them to act in respect of a matter completely the business of the state government under the federal constitution. This case requires * * * the application of the principle announced by Chief Justice Marshall in *McCulloch* v. *Maryland,* 4 Wheat, 316, 423, in a much quoted passage:
>
> " 'Should Congress, in the execution of its powers, adopt measures which are prohibited by the Constitution; or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land.' "

In the case of *Bailey* v. *Drexel Furniture Co., supra,* there was a single dissent. So that the reaffirmation of the holdings in *Hammer* v. *Dagenhart, supra,* makes the law laid down in that case more than the holding of a mere majority of the Court.

The Act of March 4, 1923, is clearly an attempted exercise of police power over local affairs under the guise of regulating interstate commerce. While involving a different subject matter, it does involve

the precise principle which was discussed and applied by the Supreme Court of the United States in *Hammer* v. *Dagenhart, supra,* and *Bailey* v. *Drexel Furniture Co., supra.*

The Act of Congress in question at once strikes down a well-known lawful industry, one which theretofore was entitled to and had the protection of the Constitution and laws of the United States. It amounts to a taking of private property ostensibly for the public good without compensation, and deprives the defendant and others similarly situated of liberty and property, without due process of law.

The power to regulate commerce is not absolute, but is subject to the limitations and guaranties of the Constitution (Const. Amend. 5), among which are those providing that private property shall not be taken for public use without just compensation and that no person shall be deprived of life, liberty or property without due process of law. *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312, 336; *United States* v. *Joint Traffic Ass'n,* 171 U. S. 505, 571, 572; *Adair* v. *United States,* 208 U. S. 161.

Property is more than a mere thing which a person owns. It is elementary. It includes the right to acquire, use and dispose of. The Constitution protects these essential attributes of property. *Buchanan* v. *Warley,* 245 U. S. 60.

The Constitution makes no exception of any particular kind of property. *Williams* v. *Mayor, etc.*, 2 Mich. 550.

The general police power is reserved to the States. The power to protect the public health and the public safety, to preserve good order and the public morals, to protect the lives and property of their citizens, "the power to govern men and things" within the limits of their dominions, by any legislation appropriate to that end and which does not encroach upon the rights guaranteed by the National Constitution, nor come in conflict with the Acts of Congress passed in pursuance of that instrument, is a power originally and always belonging to the States, not surrendered by them to the general government nor directly restrained by the Constitution of the United States. Ency. U. S. Sup. Ct. Rep., Vol. 9, p. 475.

The police powers of the States, insofar as they relate to those internal affairs which have never been surrendered, are essentially complete, unqualified, and exclusive in the individual States, and cannot be assumed by the Federal Government. Ency., *supra.*

The legislature of Illinois enacted a similar filled milk law, which was approved June 21, 1923. The Illinois Supreme Court, in *People* v. *Carolene Products Co., supra,* held it to be a violation of the Illinois Constitution and void. In that case it was said:

> The legislature had no authority to pronounce the performance of an innocent act criminal when the public health, safety, comfort, or welfare is not interfered with (*Gillespie* v. *People,* 188 Ill. 176) and may not, under the guise of protecting the public interests, arbitrarily interfere with private business or impose unusual and unnecessary restrictions upon lawful occupations. (*New State Ice Co.* v. *Liebmann,* 42 Fed. 2d, 913.) No question of imitation or fraud is involved in this case and the wholesomeness of carolene is admitted. In *People* v. *Price,* 257 Ill. 587, this court said: "It may be conceded the legislature has no authority to forbid the sale of a known wholesome article of food."

So that the State of Illinois, in the exercise of its police powers, attempted to enact a statute upon this same subject which was set aside by the highest Court in the State, and, at present, there is no such law in force and effect in that State.

Some time ago the legislature of Ohio passed a similar law. Suit was commenced to enjoin the officers of Ohio from enforcing the statute upon the ground it was unconstitutional. The relief sought was denied and an appeal taken to the United States Supreme Court. In that case the Court held the legislature of Ohio had the power to pass the act. *Hebe* v. *Shaw,* 248 U. S. 297. This authority is the one chiefly relied upon by the Government, and from this decision, together with the decisions in *Hammer* v. *Dagenhart, supra,* and *Bailey* v. *Drexel Furniture Co.,*

supra, it is clear that the Supreme Court recognizes a broad discretion in the States in the exercise of their legislative police powers, but denies the exercise of the same power to Congress, under the guise of regulating interstate commerce.

In the case of *Carolene Products Co., supra,* there was a stipulation and no question of imitation or fraud involved, and the wholesomeness of Carolene was admitted. There is no stipulation to that effect in the present case, but the report of the Senate Committee which recommended that the bill be passed, expressly recognized that the article sought to be prohibited was in fact wholesome and plainly labeled, and that the fraud which it was intended to prevent was the unfair competition of local retail dealers, in misleading their customers, and the possibility that purchasers of the product in bulk might, by some exercise of chemical skill, take the filled milk out of its containers and can it, with false labels. Any frauds of this character are so remote and local in their nature, as to be beyond the power of Congress to reach. In either case the product would be innocuous until it had reached the State and become commingled with the local property.

If the act under which this prosecution is brought is valid, then we find an unfortunate situation in Illinois. The Supreme Court of Illinois holding that the manufacture of filled milk is an innocent and legitimate occupation, not adversely affecting

the public health, safety, comfort, and welfare of the people; on the other hand, an Act of Congress providing that the business is harmful, that the article is adulterated, injurious to the public health, and a fraud upon the public, and practically prohibiting the business and the manufacture of the product in Illinois against its will.

Is the State or the Government to say which is right? Under *Hebe* v. *Shaw, supra; Hammer* v. *Dagenhart, supra,* and *Bailey* v. *Drexel Furniture Co., supra,* the Supreme Court of the United States has said, in effect, that the State is to be the judge.

Defendant's demurrer to the information must and will be sustained.

U. S. GOVERNMENT PRINTING OFFICE: 1937

INDEX

CITATIONS

33353—37

In the Supreme Court of the United States

OCTOBER TERM, 1937

UNITED STATES OF AMERICA, APPELLANT

v.

CAROLENE PRODUCTS COMPANY, A CORPORATION

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS

MEMORANDUM BRIEF FOR THE UNITED STATES IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS

The indictment in this case, filed June 19, 1935, is in two counts, each of which is based upon Sections 61–63, Title 21, United States Code, otherwise known as the Filled Milk Act of March 4, 1923.

The first count alleges that on December 1, 1934, the defendant, Carolene Products Company, a corporation, wilfully, knowingly, fraudulently and unlawfully shipped in interstate commerce from Litchfield, Illinois, to the General Grocer Company, at the City of St. Louis, Missouri, an adulterated article, to wit, filled milk, in violation of the Filled Milk Act of March 4, 1923.

The second count alleges that on December 27, 1934, the defendant, Carolene Products Company, a corporation, wilfully, knowingly, fraudulently and unlawfully shipped in interstate commerce

from Litchfield, Illinois, to N. Comensky Grocery Company, at the City of St. Louis, Missouri, an adulterated article, to wit, filled milk, in violation of the Filled Milk Act of March 4, 1923.

On June 26, 1935, the defendant filed a motion to quash the indictment on the ground, among others, that the matters and facts set out in the indictment are *res judicata*. The District Judge overruled this motion on July 7, 1937. Copies of the motion to quash and the Court's order are included in the certified typewritten record.

On July 12, 1937, a demurrer to the indictment was filed by the defendant, Carolene Products Company, and was sustained by the District Court. The Court based its decision solely upon the ground that the Filled Milk Act (U. S. C. Title 21, Secs. 61–63), upon which the indictment was founded, is unconstitutional. Its opinion referred to and adopted the reasoning of Judge FitzHenry of the same district in an opinion in a previous case between the same patries reported in 7 F. Supp. 500. The judgment of the court sustaining the demurrer was made and entered October 19, 1937. On November 18, 1937, the United States filed a petition for appeal, assignment of errors, and statement of jurisdiction. The Court signed the order allowing appeal on November 18, 1937. On November 29, 1937, the appellee filed a motion to dismiss the appeal on the ground that the decision of Judge FitzHenry, reported in 7 F. Supp. 500, is *res judicata* in the instant case.

ARGUMENT

The motion to dismiss on the ground of *res judicata* refers to a previous case between the same parties in which a criminal information [1] in three counts was filed on July 8, 1931. The first count alleged that the defendant on February 18, 1930, wilfully, knowingly, fraudulently and unlawfully shipped in interstate commerce from Litchfield, Illinois, to B. K. Wilson, at the City of Muncie, Indiana, a certain adulterated article of food, to wit, filled milk, in violation of the Filled Milk Act of March 4, 1923. The second count alleged that the defendant on February 18, 1930, wilfully, knowingly, fraudulently and unlawfully shipped in interstate commerce from Litchfield, Illinois, to B. K. Wilson, at the City of Muncie, Indiana, an adulterated article of food, to wit, filled milk, in violation of the Filled Milk Act of March 4, 1923. The third count alleged that the defendant on November 12, 1930, wilfully, knowingly, fraudulently and unlawfully shipped in interstate commerce from Litchfield, Illinois, to some persons at the City of Louisville, Kentucky, whose names were not known, an adulterated article of food, to wit, filled milk, in violation of the Filled Milk Act of March 4, 1923.

The Carolene Products Company filed a demurrer to this information, which was sustained by

[1] A certified copy of this information is printed as an Appendix hereto.

time and place first aforesaid, was in imitation and semblance of, to wit, milk, cream, skim milk, condensed milk and concentrated milk, the said filled milk, to wit, the said "Carolene" not then and there being a distinct proprietary food compound not readily mistaken in taste for milk or cream, or for evaporated, condensed or powdered milk, or cream, and not being then and there a compound prepared and designed for feeding infants and young children and customarily used on the order of physicians and not being then and there packed in individual cans containing not more than sixteen and one half ounces, and bearing a label in bold type that the content is to be used only for said purpose, and not being then and there shipped in interstate commerce as aforesaid exclusively to physicians wholesale and retail druggists, orphan asylums, Child Welfare Associations and generally disposed of by them, which said delivery for shipment in interstate commerce as aforesaid of the said filled milk, to wit, the said "Carolene" was then and there unlawful and prohibited and in violation of the Act of Congress approved March 4, 1923 entitled "An Act to Prohibit the Shipment of Filled Milk in Interstate or Foreign Commerce"; contrary to the form of the statute of the United States in such case made and provided and against the peace and dignity of the United States.

THIRD COUNT:

And the said United States Attorney further here gives the Court to understand and be informed that "Carolene Products Company, a corporation, on, to wit, the Twelfth day of November, in the year of our Lord One Thousand Nine Hun-

dred Thirty, at, to wit, Litchfield, in the County of Montgomery, in the State of Illinois, in the said Southern Division of the Southern District aforesaid and within the jurisdiction of this court, did then and there wilfully, fraudulently and unlawfully ship in interstate commerce from Litchfield, in the said County of Montgomery, in the said State of Illinois, in said Southern Division of the Southern District aforesaid, to some person, persons, corporation and corporations, whose name and names are to the said United States Attorney unknown, at the City of Louisville, in the State of Kentucky, over the lines and routes of certain common carrier and common carriers, the name and names of said common carrier and common carriers being to the said United States Attorney unknown, a certain adulterated food product injurious to the public health, to wit, certain filled milk, to wit, five hundred fifty cases of sixteen ounce cans and one hundred fifty cases of eight ounce cans, the total number of said cans being to the said United States Attorney unknown, of "Carolene" being then and there a product of condensed and concentrated skim milk, to which there had therefore been added and with which there had theretofore been blended and compounded a certain fat and oil other than milk fat, to wit, cocoanut oil and fat, so that the resulting product, to wit, the said "Carolene" then and there, to wit, at the time and place first aforesaid, was in imitation and semblance of, to wit, milk, cream, skim milk, condensed milk and concentrated milk, the said filled milk, to wit, the said "Carolene" not then and there being a distinct proprietary food compound not readily mistaken in taste for milk or cream, or

for evaporated, condensed or powdered milk or cream, and not being then and there a compound prepared and designed for feeding infants and young children, and customarily used on the order of a physician, and not being then and there packed in individual cans containing not more than sixteen and a half ounces and bearing a label in bold type, that the content is to be used only for said purpose, and not being then and there shipped in interstate commerce as aforesaid exclusively to physicians, wholesale and retail druggists, orphan asylums, Child Welfare Associations, hospitals and similar institutions and generally disposed of by them, which said shipment in interstate commerce as aforesaid of the said filled milk, to wit, the said "Carolene" was then and there unlawful and prohibited and in violation of the Act of Congress approved March 4, 1923 entitled, "An Act to Prohibit the Shipment of Filled Milk in Interstate or Foreign Commerce"; contrary to the form of the statute of the United States in such case made and provided and against the peace and dignity of the United States.

WHEREFORE, said United States Attorney in behalf of the United States prays the consideration of the court here in the premises and that due process of law may be awarded against the said Carolene Products Company, a corporation, in this behalf to make answer to the United States touching and concerning the premises aforesaid.

FRANK K. LEMON,
United States Attorney for the
Southern District of Illinois.

[Indorsement on Cover of Information]

No. 2234

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF ILLINOIS, SOUTHERN DIVISION

UNITED STATES OF AMERICA

v.

CAROLENE PRODUCTS COMPANY, A CORPORATION

CRIMINAL INFORMATION

Leave to file granted this 8th day of July, A. D. 1931.

Let summons for Carolene Products Company, a corporation, in conformity with the statutory law of the State of Illinois (Paragraph 690 Cahill Illinois Revised Statute) returnable ten days after service thereof be issued, not later than July 20th.

LOUIS FITZHENRY, *Judge.*

Filed July 8, 1931.

S. T. BURNETT, *Clerk.*

FRANK K. LEMON, *U. S. Atty.*

(Certified copy)

UNITED STATES OF AMERICA

Southern District of Illinois, ss:

I, G. W. Schwaner, Clerk of the United States District Court in and for the Southern District of Illinois, do hereby certify that the annexed and foregoing is a true and full copy of the original

Criminal Information Filed July 8, 1931, *In the Matter of The United States of American* vs. *Carolene Products Company, a Corporation,* No. 2234, as fully as the same appears from the original thereof, now remaining among the records of the said Court in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Springfield this 7th day of December, A. D. 1937.

(Sgd) G. W. SCHWANER, *Clerk.*

[SEAL] By (Sgd) JOSEPHINE C. SNYDERS,
Deputy Clerk.

U. S. GOVERNMENT PRINTING OFFICE: 1937

Judge FitzHenry, his decision being reported in 7 F. Supp. 500.

Appellee's motion to dismiss is, we submit, clearly without merit. Even were his contentions a ground of dismissal, it is quite clear from reading the criminal information in the previous case that the violations charged therein were not the same as those alleged in the indictment in the instant case. Each shipment of filled milk in violation of the Filled Milk Act of March 4, 1923, obviously constitutes a separate crime. That the doctrine of *res judicata* or *autrefois acquit* is applicable only where the *same* offenses, both in law and in fact, are involved is well settled. See *United States* v. *Oppenheimer,* 242 U. S. 85, 88; *Burton* v. *United States,* 202 U. S. 344, 380; *Carter* v. *McClaughry,* 183 U. S. 365, 395; *Flemister* v. *United States,* 207 U. S. 372; *Gravieres* v. *United States,* 220 U. S. 338, 343.

For the reasons stated we respectfully submit that the motion to dismiss the appeal should be denied.

STANLEY REED,
Solicitor General.
BRIEN MCMAHON,
Assistant Attorney General.
WILLIAM W. BARRON,
Special Assistant to the Attorney General.
WILLIAM GARBOSE,
W. MARVIN SMITH,
Attorneys.

DECEMBER 1937.

APPENDIX

[Certified Copy of Criminal Information in Previous Case]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS, SOUTHERN DIVISION

In the District Court of the United States within and for the Southern Division of the Southern District aforesaid.

At the June 1931 Term of said Court in the year of our Lord One Thousand Nine Hundred Thirty-one.

Frank K. Lemon, United States Attorney in and for the Southern District of Illinois, who in this behalf prosecutes in the name of the United States and for the United States, comes hereinto said Court on this 8th day of July in the year of our Lord One Thousand Nine Hundred Thirty-one in his own proper person, and for the United States gives the said Court here to understand and be informed that the Carolene Products Company, a corporation, on, to wit, the Eighteenth day of February, in the year of our Lord One Thousand Nine Hundred Thirty, at, to wit, Litchfield, in the County of Montgomery, in the State of Illinois, in the said Southern Division of the Southern District aforesaid, and within the jurisdiction of this Court, did then and there willfully, fraudulently and unlawfully ship in interstate commerce from the said Litchfield, in the said County of Montgomery, in the said State of Illinois, in the said Southern Division of the Southern District aforesaid, to one B.

K. Wilson, at the City of Muncie, in the State of Indiana, over the lines and routes of Railway Express Agency, a corporation, and a common carrier, a certain adulterated article of food injurious to the public health, to wit, certain filled milk, to wit, one case of "Carolene" being then and there a product of condensed and concentrated skim milk, to which there had theretofore been added and with which there had theretofore been blended and compounded a certain fat and oil other than milk fat, to wit, cocoanut oil and fat, so that the resulting product, to wit, the said "Carolene" then and there, to wit, at the time and place first aforesaid, was in imitation and semblance of, to wit, milk, cream, skim milk, condensed milk and concentrated milk, the said filled milk, to wit, the said "Carolene" not then and there being a distinct proprietary food compound not readily mistaken in taste for milk or cream, or for evaporated, condensed or powdered milk or cream, and not being then and there a compound prepared and designed for feeding infants and young children, and customarily used on the order of a physician, and not being then and there packed in individual cans containing not more than sixteen and a half ounces and bearing a label in bold type, that the content is to be used only for said purpose, and not being then and there shipped in interstate commerce as aforesaid exclusively to physicians, wholesale and retail druggists, orphan asylums, Child Welfare Associations, hospitals and similar institutions and generally disposed of by them, which said shipment in interstate commerce as aforesaid of the said filled milk, to wit, the said "Carolene" was then and there unlawful and prohibited and in violation of the Act of Congress ap-

roved March 4, 1923 entitled, "An Act to Prohibit
ie Shipment of Filled Milk in Interstate or For-
gn Commerce"; contrary to the form of the stat-
te of the United States in such case made and
rovided and against the peace and dignity of the
nited States.

ECOND COUNT:

And the said United States Attorney further
ere gives the Court to understand and be in-
rmed that Carolene Products Company, a cor-
oration, on, to wit, the Eighteenth day of Feb-
uary, in the year of our Lord One Thousand Nine
undred Thirty, at, to wit, Litchfield, in the County
Montgomery, in the State of Illinois, in the said
outhern Division of the Southern District afore-
id and within the jurisdiction of this Court, did
ien and there willfully, fraudulently and unlaw-
ully deliver to Railway Express Agency, a corpo-
ation, and a common carrier, for shipment in inter-
ate commerce from the said Litchfield, in the said
ounty of Montgomery, in the said State of Illi-
ois, in the said Southern Division of the Southern
istrict aforesaid, to one B. K. Wilson, at the City
Muncie, in the State of Indiana, a certain adul-
rated food product injurious to the public health,
wit, certain filled milk, to wit, one case of "Caro-
ne", being then and there a product of condensed
nd concentrated skim milk, to which there had
eretofore been added and with which there had
eretofore been added and with which there had
eretofore been blended and compounded, a cer-
in fat and oil other than milk fat, to wit, a cocoa-
ut oil and fat, so that the resulting product, to wit,
e said "Carolene" then and there, to wit, at the

Miscellaneous—Continued.

INDEX

CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 640

THE UNITED STATES OF AMERICA, APPELLANT

v.

CAROLENE PRODUCTS COMPANY

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The District Court filed an opinion sustaining a demurrer to the indictment on October 19, 1937 (R. 6). This opinion adopts and applies to the instant case the opinion of District Judge Fitz Henry in the case of *United States* v. *Carolene Products Company*, 7 Fed. Supp. 500.

JURISDICTION

The judgment of the District Court was entered on October 19, 1937 (R. 6, 7). The appeal was prayed and allowed on November 18, 1937 (R. 8, 9).

The jurisdiction to review the judgment complained of, by direct appeal, is conferred by the Criminal Appeals Act of March 2, 1907, 34 Stat. 1246 (U. S. C., Title 18, Sec. 682).

Probable jurisdiction was noted by this Court on January 3, 1938.

QUESTION PRESENTED

Whether the District Court erred in sustaining a demurrer to the indictment on the ground that the Filled Milk Act of March 4, 1923, is unconstitutional.

STATUTE INVOLVED

The Act of March 4, 1923, chapter 262, 42 Stat. 1486–7; United States Code, Title 21, Sections 61–63, hereinafter referred to as The Filled Milk Act, provides as follows:

> SECTION 61. Filled milk; definitions. Whenever used in sections 62 and 63 of this title—
>
> (a) The term "person" includes an individual, partnership, corporation, or association;
>
> (b) The term "interstate or foreign commerce" means commerce (1) between any State, Territory, or possession, or the District of Columbia, and any place outside thereof; (2) between points within the same State, Territory, or possession, or within the District of Columbia, but through any place outside thereof; or (3) within any Territory or possession, or within the District of Columbia; and

(c) The term "filled milk" means any milk, cream, or skimmed milk, whether or not condensed, evaporated, concentrated, powdered, dried, or desiccated, to which has been added, or which has been blended or compounded with, any fat or oil other than milk fat, so that the resulting product is in imitation or semblance of milk, cream, or skimmed milk, whether or not condensed, evaporated, concentrated, powdered, dried, or desiccated. This definition shall not include any distinctive proprietary food compound not readily mistaken in taste for milk or cream or for evaporated, condensed, or powdered milk, or cream where such compound (1) is prepared and designed for feeding infants and young children and customarily used on the order of a physician; (2) is packed in individual cans containing not more than sixteen and one-half ounces and bearing a label in bold type that the content is to be used only for said purpose; (3) is shipped in interstate or foreign commerce exclusively to physicians, wholesale and retail druggists, orphan asylums, child-welfare associations, hospitals, and similar institutions and generally disposed of by them (Mar. 4, 1923, c. 262, sec. 1, 42 Stat. 1486).

SECTION 62. Same; manufacture, shipment, or delivery for shipment in interstate or foreign commerce prohibited. It is declared that filled milk, as herein defined, is an adulterated article of food, injurious to

the public health, and its sale constitutes a fraud upon the public. It shall be unlawful for any person to manufacture within any Territory or possession, or within the District of Columbia, or to ship or deliver for shipment in interstate or foreign commerce, any filled milk (Mar. 4, 1923, c. 262, sec. 2, 42 Stat. 1487).

SECTION 63. Same; penalty for violations of law; acts, omissions, and so forth, of agents. Any person violating any provision of sections 61 and 62 of this title shall upon conviction thereof be subject to a fine of not more than $1,000 or imprisonment of not more than one year, or both. When construing and enforcing the provisions of said sections, the act, omission, or failure of any person acting for or employed by any individual, partnership, corporation, or association, within the scope of his employment or office, shall in every case be deemed the act, omission, or failure, of such individual, partnership, corporation, or association, as well as of such person (Mar. 4, 1923, c. 262, sec. 3, 42 Stat. 1487).

STATEMENT

On June 19, 1935, the appellee corporation was indicted in the United States District Court for the Southern District of Illinois, Southern Division (R. 1). The indictment is in two counts. The first count alleges that on December 1, 1934, the appellee, Carolene Products Company, a corporation, unlaw-

fully shipped in interstate commerce from Litchfield, Illinois, to the General Grocer Company, at the City of St. Louis, Missouri, an adulterated article; to wit, filled milk, in violation of the Filled Milk Act of March 4, 1923. The second count alleges a shipment to a different consignee on another date.

On June 26, 1935, the appellee filed a motion to quash the indictment on the ground, among others, that the matters and facts set out in the indictment are res judicata (R. 3, 4). The District Court overruled this motion on July 7, 1937 (R. 4).

On July 12, 1937, a demurrer to the indictment attacking the constitutionality of the Filled Milk Act was filed by the appellee corporation (R. 5), which demurrer was sustained for the reasons assigned in the opinion of Judge FitzHenry, reported in 7 Fed. Supp. 500. After judgment of the court sustaining the demurrer was entered on October 19, 1937, the United States, on November 18, 1937, filed a petition for appeal, assignment of errors, and statement of jurisdiction with the District Court (R. 7, 8). On the same day the District Court signed the order allowing appeal (R. 8, 9). On November 29, 1937, the appellee filed a motion to dismiss the appeal. On January 3, 1938, this Court noted probable jurisdiction.

SPECIFICATION OF ERRORS TO BE URGED

1. That the Court committed material error against plaintiff in sustaining the demurrer of the

defendant, Carolene Products Company, a corporation, to each and every count of the indictment.

2. That the Court committed material error against plaintiff in holding that the Filled Milk Act, Secs. 61–63, Title 21, United States Code, under which each count of the indictment is drawn, is unconstitutional.

3. That the Court committed material error against plaintiff in holding that the Filled Milk Act, Secs. 61–63, Title 21, United States, under which each count of the indictment is drawn, is unconstitutional as contravening the due process clause of the Fifth Amendment.

4. That the Court committed material error against plaintiff in holding that the Filled Milk Act, Secs. 61–63, Title 21, United States Code, under which each count of the indictment is drawn, is unconstitutional as a regulation of matters within the jurisdiction of the various States under the guise of regulating interstate commerce.

SUMMARY OF ARGUMENT

The Filled Milk Act is an appropriate exercise of the power of Congress over interstate commerce. The Circuit Court of Appeals for the Seventh Circuit, to which the present case would have gone had an appeal lain to an intermediate court, so held after the decision of the court below was rendered. *Carolene Products Co.* v. *Evaporated Milk Association,* 93 F. (2d) 202. The power of Congress is not limited to prohibition of the shipment of articles which are noxious in character. *Kentucky*

Whip and Collar Co. v. *Illinois Central Railroad Co.*, 299 U. S. 334. While recognizing that the ingredients of filled milk are not in themselves unwholesome, Congress has recognized and declared that filled milk is injurious to the public health and its sale constitutes a fraud upon the public. The basic facts underlying this conclusion are that filled milk is designed as a substitute for whole milk; that the extraction of the butter fat from whole milk in the manufacture of filled milk removes virtually all of the vitamin A content of the milk, which is of major importance in the human diet as a growth-producing and disease-preventing element; and that the substitution of vegetable fat, such as coconut oil, for the butter fat makes filled milk identical with evaporated or condensed whole milk in color, consistency, and taste, the difference requiring expert analysis to detect. In view of the findings of Congress, the case is one for the application of the familiar doctrine that Congress may prohibit the interstate shipment of articles in order to prevent the spread of harm and deception among the people of the several States. The Filled Milk Act is essentially an amendment to the Pure Food and Drugs Act.

The Act does not violate the Fifth Amendment. This question is, we submit, concluded by the decision of this Court in *Hebe Co.* v. *Shaw*, 248 U. S. 297. That decision sustained a statute of Ohio which was applied to prohibit the sale of filled milk even though it was not found to be a noxious article and

even though it was properly labeled. At the time of the passage of the Federal statute, 11 States had prohibited or effectively controlled the local sale of filled milk. At the present time more than 30 States have enacted legislation specifically directed against the sale of filled milk. Although the validity of the Federal Act in so far as the Fifth Amendment is concerned could hardly be challenged in the light of the widespread opinion reflected in this state legislation, Congress itself, through its committees, made an independent investigation of the subject. The conclusions reached are embodied in the reports of the committees, printed as Appendix A, *infra*, pp. 31–46. The necessity of prohibiting the shipment of filled milk in order to protect the public health and to prevent the substitution of an imitation product for whole milk by reason of fraud or ignorance, is at most a debatable question. No showing has been attempted, nor could a showing be made in the face of the expert testimony adduced at the Congressional hearings, that the findings of Congress are without support in fact. It follows that the legislative judgment should be sustained.

ARGUMENT

I

THE FILLED MILK ACT IS AN APPROPRIATE EXERCISE OF THE POWER OF CONGRESS OVER INTERSTATE COMMERCE

The respondent by its demurrer concedes that the compounds trade marked "Milnut" and "Caro-

lene," named in the indictment, are filled milk within the definition of the Act of March 4, 1923, *supra,* p. 2. The only question presented, therefore, is the constitutional validity of the Act.

Filled milk, as defined in the statute and as described in the Committee reports of Congress, *infra,* pp. 32–48, is an imitation of condensed or evaporated whole milk made by extracting butter fat from whole milk and substituting therefor a fat such as coconut oil. The skimmed milk is reduced by evaporation to about half its bulk, and there is added from 6 to 8 per cent of coconut fat. The resulting mixture is an exact imitation of evaporated or condensed whole milk. It has the same consistency, the same color, and the same taste; the difference in the two products can be detected only by an expert or by chemical analysis. (See Senate Committee Report, *infra,* p. 49; House Committee Report, *infra,* p. 32.)

The District Court held, on the authority of a prior District Court decision, that Congress is without power to prohibit the shipment of filled milk in interstate commerce.[1] It may be observed at the outset that if an appeal had lain from the decision of the court below to the Circuit Court of Appeals, the decision of the District Court would have been

[1] The prior decision, *United States* v. *Carolene Products Co.*, 7 F. Supp. 500, was not appealed by the United States because the case arose on an information, and the sustaining of a demurrer thereto is not appealable under the Criminal Appeals Act.

reversed. After the decision of the District Court was rendered, and shortly after an appeal to this Court was allowed, the Circuit Court of Appeals for the Seventh Circuit held, in *Carolene Products Co. v. Evaporated Milk Association*, 93 F. (2d) 202, that the Filled Milk Act is constitutional. The opinion in that case contains an extensive and illuminating discussion of the question.

The opinion of the District Court which was adopted and applied by the court below rested on *Hammer* v. *Dagenhart*, 247 U. S. 251, and *Bailey* v. *Drexel Furniture Co.*, 259 U. S. 20. The opinion did not discuss or cite the great body of decisions upholding the power of Congress under the commerce clause to prevent the channels of interstate commerce from being used to promote the "spread of any evil or harm to the people of other states from the state of origin." *Brooks* v. *United States*, 267 U. S. 432, 436–437. Those decisions, reviewed and applied in the *Brooks* case, recognized that the harm which Congress may seek to control need not inhere in the articles of commerce themselves. Thus, the stolen automobiles dealt with in the Motor Vehicle Theft Act are not in themselves dangerous articles, at least not so because of their character as stolen vehicles. Therefore any argument designed to prove that the ingredients of filled milk are, separately or in combination, wholesome, is, from the standpoint of the power of Congress, beside the mark. It was never laid down as a limitation on the power of Congress to prohibit the transpor-

tation of articles in interstate commerce that the policy must go no further than to prevent the shipment of articles which are inherently noxious. If any such limitation was ever thought to exist, the misapprehension was clearly dispelled in *Kentucky Whip & Collar Co.* v. *Illinois Central R. R. Co.*, 299 U. S. 334. In sustaining the Ashurst-Sumners Act, dealing with convict-made goods in interstate commerce, the Court pointed to the wide variety of evils which Congress may seek to control and prevent by the prohibition of interstate shipment. The Court said (299 U. S. at 347):

> The anticipated evil or harm may proceed from something inherent in the subject of transportation as in the case of diseased or noxious articles, which are unfit for commerce. *Hipolite Egg Co.* v. *United States*, 220 U. S. 45; *Oregon Washington R. & N. Co.* v. *Washington*, 270 U. S. 87, 99. Or the evil may lie in the purpose of the transportation, as in the case of lottery tickets, or the transportation of women for immoral purposes. *Champion* v. *Ames*, 188 U. S. 321, 358; *Hoke* v. *United States, supra; Caminetti* v. *United States*, 242 U. S. 470, 486. The prohibition may be designed to give effect to the policies of the Congress in relation to the instrumentalities of interstate commerce, as in the case of commodities owned by interstate carriers. *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366, 415. And, while the power to regulate interstate commerce resides in the Congress,

> which must determine its own policy, the Congress may shape that policy in the light of the fact that the transportation in interstate commerce, if permitted, would aid in the frustration of valid state laws for the protection of persons and property. *Brooks* v. *United States, supra; Gooch* v. *United States,* 297 U. S. 124.

In the *Kentucky Whip and Collar* case the Court reviewed comprehensively the numerous exercises of Congressional power to prohibit interstate transportation. The Court pointed out that this power has been upheld in relation to diseased livestock,[2] lottery tickets,[3] commodities owned by the interstate carrier transporting them, except such as may be required in the conduct of its business as a common carrier,[4] adulterated and misbranded articles, under the Pure Food and Drugs Act,[5] women, for immoral purposes,[6] intoxicating liquors,[7] diseased

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[2] Act of May 29, 1884, 23 Stat. 31; *Reid* v. *Colorado*, 187 U. S. 137. See *Champion* v. *Ames*, 188 U. S. 321, 358, 359.

[3] Act of March 2, 1895, 28 Stat. 963; *Champion* v. *Ames*, 188 U. S. 321.

[4] Act of June 29, 1906, 34 Stat. 584; *United States* v. *Delaware and Hudson Company*, 213 U. S. 366, 415.

[5] Act of June 30, 1906, 34 Stat. 768; *Hipolite Egg Company* v. *United States*, 220 U. S. 45; *Seven Cases* v. *United States*, 239 U. S. 510.

[6] Act of June 25, 1910, 36 Stat. 825; *Hoke* v. *United States*, 227 U. S. 308; *Caminetti* v. *United States*, 242 U. S. 470.

[7] Act of March 1, 1913, 37 Stat. 699; Act of March 3, 1917, 39 Stat. 1069; *Clark Distilling Co.* v. *Western Maryland Ry. Co.*, 242 U. S. 311; *United States* v. *Hill*, 248 U. S. 420; *McCormack & Co.* v. *Brown*, 286 U. S. 131.

plants,[8] stolen motor vehicles,[9] and kidnaped persons.[10]

Once the objection is put aside that only noxious articles may be kept from the channels of interstate commerce, the power of Congress to prohibit the interstate shipment of filled milk cannot be assailed. The Filled Milk Act is in fact an instance of one of the most familiar kinds of Congressional regulation of interstate commerce. The Act is designed to protect the public health from injury and to prevent deception through use of the channels of interstate commerce. Congress has found—and its findings, as we shall show, *infra,* pp. 21–28, are amply supported by investigations, by expert opinion, and by widespread public conviction—that filled milk is an adulterated article of food, injurious to the public health, and that its sale constitutes a fraud upon the public. The basic facts underlying this finding may be briefly stated at this point. The butter fat content of whole milk contains virtually all of the Vitamin A for which milk is particularly valuable. The extraction of the butter fat from whole milk and the substitution of coconut oil results in the creation of a product which is almost wholly lacking in Vitamin A and which, nevertheless, because of the substitution of

[8] Act of March 4, 1917, 39 Stat. 1165; *Oregon-Washington R. & N. Co.* v. *Washington*, 270 U. S. 87.

[9] Act of October 29, 1919, 41 Stat. 324; *Brooks* v. *United States*, 267 U. S. 432.

[10] Act of June 22, 1932, 47 Stat. 326; Act of May 18, 1934, 48 Stat. 781; *Gooch* v. *United States*, 297 U. S. 124.

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coconut oil, is indistinguishable in appearance, consistency, and taste from whole milk, except by expert analysis. The importance of Vitamin A as an essential growth-producing and disease-preventing factor, and of the butter fat in milk as a prime source relied upon to supply Vitamin A, particularly in the diet of infants, is widely recognized.[10a] The effect on the public health brought about by the interstate marketing of an imitation product is clearly a matter of which Congress is clothed with the power, if not indeed charged with the responsibility, of taking cognizance and forestalling. The facts underlying the conclusions of Congress are not controverted in the record in the case at bar.

In view of the findings of Congress, the statute is essentially similar to the Pure Food and Drugs Act. Section 7 of that Act provides that an article of food shall be considered adulterated "if any substance has been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength," or "if any substance has been substituted wholly or in part for the article," or "if any valuable constituent of the article has been wholly or in part abstracted," and shall be considered misbranded (sec. 8) "if it be an imitation of or offered

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[10a] See, *e. g.*, Dr. Henry C. Sherman, *The Meaning of Vitamin A*, in *Science*, Dec. 21, 1928, p. 619; Dr. E. V. McCollum et al., *The Newer Knowledge of Nutrition* (1929 ed.), p. 134; Dr. A. S. Root, *Food Vitamins* (N. Car. State Board of Health, May 1931), p. 2; Dr. Mary S. Rose, *The Foundations of Nutrition* (1933), p. 237; Dr. Henry C. Sherman, *Chemistry of Food and Nutrition* (1933), p. 367.

for sale under the distinctive name of another article." Section 8 contains a proviso, however, to the effect that an article shall not be considered adulterated or misbranded "in the case of * * * compounds * * * under their own distinctive names, and not an imitation of or offered for sale under the distinctive name of another article." Inasmuch as the manufacturers of filled milk do not label their cans as milk, but with trade names such as "Milnut," it was thought that filled milk was not within the purview of the Pure Food and Drugs Act. See Senate Report, *infra*, pp. 50. Indeed, the Filled Milk Act as originally introduced in the House of Representatives took the form of an amendment to the Pure Food and Drugs Act. The author of the bill thus explained the change in form from that of an amendment to that of an independent act (62 Cong. Rec. 7581):

> I will say to the gentleman that I originally introduced the bill, H. R. 6215, which was an amendment to the Pure Food and Drugs Act. That bill I submitted to the Secretary of Agriculture and he objected to it because he did not approve of specifying any particular food product in the Pure Food and Drugs Act. But representatives of the Department appeared before the Committee and expressed themselves in favor of legislation to curb the production and sale of filled milk. Then, after the hearings were completed, I redrafted the

bill in its present form. The subject matter of both bills is the same.

In view of what has been said, the inapplicability of *Hammer* v. *Dagenhart,* upon which the District Court relied, is evident. In that case a majority of the Court regarded the legislation as a regulation of conditions of manufacture, violation of which was penalized by an embargo on interstate transportation. As this Court pointed out in the *Kentucky Whip and Collar* case, there was full recognition in *Hammer* v. *Dagenhart* of the power of Congress to prohibit interstate transportation which served to spread harm among the people of the several States. Consequently, there appears to be no occasion in the present case to reexamine the view of the Court in *Hammer* v. *Dagenhart* in relation to the legislation and the facts there presented. It may simply be observed that a construction of that decision which would make it controlling here would require a departure from established constitutional doctrine applied both before and since that decision.

It is, of course, no valid ground of objection to the statute that it may tend to accomplish a purpose which the States themselves may also seek to bring about. The exercise by Congress of a granted power is none the less valid though it partakes in some measure of the quality of a police regulation. *Seven Cases* v. *United States,* 239 U. S. 510, 514. As was said in *Hamilton* v. *Kentucky Distilleries Co.,* 251 U. S. 146, 156:

> That the United States lacks the police power, and that this was reserved to the States by the Tenth Amendment, is true. But it is none the less true that when the United States exerts any of the powers conferred upon it by the Constitution, no valid objection can be based upon the fact that such exercise may be attended by the same incidents which attend the exercise by a State of its police power, or that it may tend to accomplish a similar purpose. *Lottery Case,* 188 U. S. 321, 357; *McCray* v. *United States,* 195 U. S. 27; *Hipolite Egg Co.* v. *United States,* 220 U. S. 45, 58; *Hoke* v. *United States,* 227 U. S. 308, 323; *Seven Cases* v. *United States,* 239 U. S. 510, 515; *United States* v. *Doremus,* 249 U. S. 86, 93–94.

The relation of the Filled Milk Act to state power and state legislation fortifies, rather than weakens, the conclusion that it is a valid exercise of Congressional power. If a State wishes to tolerate the manufacture and sale within its borders of filled milk, there is nothing in the Federal statute which deprives the State of that choice. It is noteworthy, however, that at the time of the passage of the Filled Milk Act in 1923, eleven States had either prohibited entirely the manufacture and sale of filled milk or had restricted the business in such a way as to make commercial exploitation impossible. See Senate Report, *infra,* p. 57. At the present time more than 30 States have enacted legislation which specifically forbids the manufacture and sale

of filled milk. See Appendix B, *infra*. For the very reason that filled milk is not inherently noxious, the States are doubtless without power to prohibit its importation from other States. See *Schollenberger* v. *Pennsylvania*, 171 U. S. 1. Therefore the exercise of Federal power is particularly appropriate in preventing interstate shipment and so in protecting state policy in a majority of the States. In the case at bar, for example, the articles described in the indictment were destined for shipment to Missouri, which since 1923 has outlawed the manufacture and sale of filled milk.

The power of Congress is not, however, dependent upon the prior exercise by the States of their own police power. The Constitution does not require that the Federal Government shall be laggard in recognizing and dealing with the spread of harm; nor need Congress adapt its policy to conform strictly to the policy of the individual States. "The power to regulate interstate commerce resides in the Congress, which must determine its own policy." *Kentucky Whip and Collar Co.* v. *Illinois Central R. R. Co.*, 299 U. S. at 347. Cf. *United States* v. *Hill*, 248 U. S. 420.

II

THE FILLED MILK ACT DOES NOT VIOLATE THE FIFTH AMENDMENT.

The argument that the Filled Milk Act constitutes a violation of the Fifth Amendment is, we submit, definitely disposed of by the decision of this

court in *Hebe Co.* v. *Shaw*, 248 U. S. 297. That case involved a statute of Ohio which, as construed, forbade the sale of condensed skimmed milk. The statute was applied by the state authorities to the sale of "Hebe," a compound similar in all respects to the product here involved; the article was a combination of skimmed milk and coconut oil. It was urged there that the product was pure and wholesome; that it contained no deleterious substance; that it was properly labeled and sold under a distinctive trade name; and that to prohibit its sale constituted a violation of the Fourteenth Amendment. This Court, affirming a decision of the District Court, held that the statute was applicable in its terms, that it did not constitute a burden on interstate commerce, and that it did not contravene the provisions of the Fourteenth Amendment. This Court said (pp. 302–303):

> the [State] statute could not direct itself to the product [Hebe] as distinguished from the name more clearly than it does. You are not to make a certain article, whatever you call it, except from certain materials—the object plainly being to secure the presence of the nutritious elements mentioned in the act, and to save the public from the fraudulent substitution of an inferior product that would be hard to detect. *Savage* v. *Jones*, 225 U. S. 501, 524 * * * It seems entirely clear that condensed skimmed milk is forbidden out and out. But if so the statute cannot be avoided by adding a small amount

> of cocoanut oil. We may assume that the product is improved by the addition, but the body of it still is condensed skimmed milk, and this improvement consists merely in *making the cheaper and forbidden substance more like the dearer and better one and thus at the same time more available for a fraudulent substitute.* It is true that so far as the question of fraud is concerned the label on the plaintiffs' cans tells the truth—but the consumer in many cases never sees it. Moreover, when the label tells the public to use Hebe for purposes to which condensed milk is applied and states of what Hebe is made, it more than half recognizes the plain fact that Hebe is nothing but condensed milk of a cheaper sort. [Italics supplied.]

The products involved in the *Hebe* case and in the case at bar are substantially identical. It is true that the scope of the statutes is somewhat different, but the difference is of no consequence since the application of the statutes to the facts is the same in both cases. Furthermore, in so far as the two statutes differ in scope, the Federal Act falls even more clearly within the bounds of permissible power as described in the *Hebe* case. The statute there involved forbade the sale of all condensed skimmed milk, whether or not a substitute oil was added. That statute was sustained by virtue of a power of the State to save the public from the substitution of skimmed milk for whole milk. This Court held that the addition of coconut oil in the

product involved in that case did not take it out from under the purview of the statute; and that in fact the addition of the oil served to strengthen the resemblance of the product to whole milk and so to make "the cheaper and forbidden substance more like the dearer and better one and thus at the same time more available for a fraudulent substitute." The fact that the product was not falsely labeled was held to be immaterial on the question of the power of the State. The Federal Filled Milk Act is confined in its scope to products which, like appellee's, are compounded with substitute oils. It is this element, as the Court observed in the *Hebe* case, which makes the product particularly susceptible of substitution for whole milk through fraud, deception, or ignorance.

Apart from the decision of this Court in *Hebe Co.* v. *Shaw,* the fact that 31 States have specifically prohibited the manufacture and sale of filled milk is evidence of the strongest sort that the prohibition in the Federal Act rests not on arbitrary fiat but on widespread conviction that the prohibition is necessary in the public interest.[11] As was said in

[11] In three states statutes prohibiting the sale of filled milk have been declared unconstitutional. *People* v. *Carolene Products Co.*, 345 Ill. 166, followed in *Carolene Products Co.* v. *McLaughlin*, 365 Ill. 62; *Carolene Products Co.* v. *Thomson*, 276 Mich. 172; *Carolene Products Co.* v. *Banning*, 131 Neb. 429. Four similar State statutes have been sustained. *Reiter* v. *State*, 109 Md. 235; *State* v. *Emery*, 178 Wis. 147; *Hebe Co.* v. *Calvert*, 246 Fed. 711, affirmed

Purity Extract Co. v. *Lynch*, 226 U. S. 192, 204–205: "That the opinion is extensively held * * * sufficiently appears from the legislation of other states and the decision of the courts in its construction. * * * We cannot say that there is no basis for this widespread conviction."

The Congress did not, however, rely merely upon the fact that at the time of the enactment of the Federal Act eleven States had effectively prohibited the manufacture and sale of filled milk. Congress undertook an extensive and independent investigation of its own. Hearings were held before the Committee on Agriculture of the House of Representatives from June 13, 1921, to July 20, 1921 (Hearings on H. R. 6215, 67th Cong., 1st Sess.). The Senate Committee on Agriculture and Forestry held hearings from June 30, 1922, to August 7, 1922 (Hearings on H. R. 8086, 67th Cong., 2d Sess.). At the House Committee hearing twelve witnesses appeared in support of the bill and twelve against. At the Senate Committee hearing 27 witnesses appeared in support of the bill and 20 against.

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248 U. S. 297; *Carolene Products Co.* v. *Carter*, Supreme Court of Pennsylvania, decision not yet reported. As will be noted from Appendix B, *infra*, pp. 60–68, many of the state statutes whose validiy has not been expressly passed upon have been in effect for 15 years or more. No persuasive reason has been advanced why the decision in *Hebe Co.* v. *Shaw*, *supra*, should not be deemed controlling on the Federal constitutional question.

Among the witnesses who testified in support of the bill before one or both of the committees, either orally or through the presentation of written statements, were scientists of outstanding reputation and achievement. These included Dr. E. V. McCollum, head of the Department of Chemistry, School of Hygiene and Public Health, The Johns Hopkins University (House Hearings, pp. 19–37; Senate Hearings, pp. 20–25; 166–192)[12]; Dr. Charles S. Summers, head of the Children's Clinic, University of Maryland (Senate Hearings, pp. 47–49)[13]; Dr. John C. Gittings, Professor of Pediat-

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[12] Dr. McCollum stated: "I guarantee that any infant that is fed for a few weeks on one of these milk substitutes will develop rickets as severe as you see it right here [exhibiting photograph]" (House Hearings, p. 33). Dr. McCollum described experiments which he had conducted on animals fed with filled milk and with evaporated whole milk:

"I have here two animals which were fed on this same diet of rolled oats, properly supplemented with inorganic elements, and in this case we put in 22½ per cent of Hebe, a filled milk with coconut oil in place of butter fat. You will notice that this rat is very emaciated and thin, that his eyes are swollen shut, and I will tell you we photographed him only the day before he died, because his death was imminent.

"This one had been on the same diet, except that we substituted the 22½ per cent of Hebe by a 22½ per cent of Carnation milk made by the same company that manufactures Hebe. The animals were fed the same amount, but Carnation milk had the butter fat in it whereas Hebe did not have it" (Senate Hearings, p. 24).

[13] Dr. Summers stated that in Maryland, where he practiced, the sale of filled milk was prohibited, and said: "if you substantiate as a fact that the babies are being fed a

rics, Graduate School of Medicine, University of Pennsylvania (Senate Hearings, pp. 25–27; 192–194)[14]; Professor E. B. Hart, Department of Agricultural Chemistry, University of Wisconsin (House Hearings, p. 161; Senate Hearings, p. 245).[15] Witnesses of scientific qualifications likewise testified in opposition to the bill.

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vegetable food, which is devoid of vitamins, with skim milk; if you substantiate this, you are absolutely doing the babies and children in the United States an untold harm to allow the sale of filled milk to continue" (Senate Hearings, p. 49).

[14] Dr. Gittings stated: "I have been practicing pediatrics for 25 years, and if there is any one thing in the realm of feeding or of nutrition that has impressed itself upon my mind in that time, it is that the child who, for any reason, is deprived of butter fat, labors under a tremendous handicap, and sooner or later, to a greater or less degree, almost invariably will be undernourished and often subnormal in growth. That is a fact which I think is incontrovertible.

* * * * *

"* * * If you voluntarily deprive the child of cow's milk fat and substitute another form of fat, you can expect undernutrition, and undernutrition is almost surely followed by the disease known as rickets" (Senate Hearings, p. 26).

Dr. Gittings further stated: "My own experience of 25 years of infant feeding has been that there is no more sure way of producing rickets than by feeding skimmed milk deprived of fat and bolstered up with carbohydrates" (*Id.*, pp. 192–193).

[15] Professor Hart, in an article published in Bulletin 342, Wisconsin Experiment Station, stated: "Whole milk in the nutrition of the young stands in a class by itself as a great protective food, and any attempt to substitute something inferior, such as filled milk, is to traffic in human lives for monetary gain. * * * We urge Federal legislation that will prohibit the manufacture and sale of filled milks. Such

The conclusion necessarily to be drawn from the hearings is that, viewed in the light most favorable to the opposition, the question whether filled milk should be prohibited in the channels of interstate commerce, in the interest of health and the prevention of deception, was a debatable one. This conclusion was frankly expressed by one of the opposition witnesses, Dr. Casimir Funk, of Columbia University, who said (Senate Hearing, p. 123):

> What I have said here indicates plainly there are two opinions on the skimmed-milk legislation—one opinion headed by Doctor McCollum and others, maintaining that such products should be barred from the market; other opinions maintained by Dr. Mendel, myself, and others imagine that this measure would not be justified on the face of the present scientific facts.

While it is not feasible to recount in detail the evidence before the Congressional committees, a convenient summary of that evidence is contained in the opinion of the Circuit Court of Appeals for the Seventh Circuit in *Carolene Products Co.* v. *Evaporated Milk Association,* 93 F. (2d) 202.

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legislation should be passed if for no better reason than that an uninformed public is just as likely to buy the substitute as it is to buy the genuine article, namely, the evaporated whole milk" (Senate Hearings, p. 245). Professor Hart pointed out that experiments demonstrated that at least 90 per cent of the fat-soluble vitamin of whole milk is removed in the modern commercial skimming process (~~Home~~ House Hearings, p. 161).

With respect to the harmful effects of the use of filled milk as a substitute for whole milk, the court thus summarized the evidence (93 F. (2d) 205):

> The scientists before the committees pointed out that milk is a food for which there is no effective substitute and upon which we have depended for generations; that the valued Vitamin A of milk occurs in no vegetable oil; that an infant fed for a few weeks on a milk substitute, such as here involved, will develop rickets, scurvy, serious eye diseases; beriberi; that even tuberculosis may be traced to the lack of the vitamins of milk in the diet; and that the chief source of such in milk is the butter fat which is removed from filled milk. Experts testified that, when rats were fed over a given period of time on identical rations except that in one pure milk was used and in the other filled milk, those fed on the first diet grew in a natural way, whereas those fed on the second grew to but half the size, developed bodily deformities contracted a fatal eye disease, and died within sixty days after the experiment began. The witnesses asserted that a nursing mother who does not receive sufficient Vitamin A in her diet supplied only by milk can not transmit healthful milk to her offspring.
>
> The evidence included reports from various authentic sources to the effect that butter fat possesses a biological function which can not be supplied by any vegetable oil in combination with skimmed milk; that

> growth of the human body and the quality of children's teeth and their health depend largely upon milk in the diet; and that "there is no evidence of any satisfactory substitute but every evidence against the substitution of cheap vegetable fat."

And with respect to the danger of deception, through fraud or ignorance, in the marketing of filled milk as a substitute for whole milk, the court said (93 F. (2d) 205):

> That the Congress had reliable information before it supporting the wisdom of the proposed legislation appears from the reports of its committees. Those bodies found and reported certain facts: The mixture of skimmed milk and oil is an exact imitation of pure condensed or evaporated milk; it has the same consistency, color and taste; the difference in the two products can be detected only by an expert or by chemical analysis; the compound can be made more cheaply than the regular article, and in view of the fact that the imitation is perfect, many people buy it in the belief that they are getting full condensed or evaporated milk; manufacturers do not label it as milk but it is put up in the same sized cans as regular condensed milk and is advertised by the retail dealers as milk and evaporated milk. Storekeepers sell it with the statements that "it takes the place of milk," "is just as good as condensed milk and much cheaper"; that there is "nothing better on the market" and

> "takes the place of condensed milk." Instances were reported in which coconut fat had been mixed with milk and sold as cream and others in which the compound had been used in making ice cream. The article is sold largely in sections inhabited by people unable to read English and of limited means, and scarcely at all in the more enlightened districts. As a consequence, the label is of little or no protection to the purchasing public, in advising them that the product they buy is a mixture of milk and vegetable oils.

The reports of the Congressional committees, printed in full, *infra*, pp. 31–46, contain clear and detailed findings in support of the conclusion, as expressed in the statute, that filled milk is injurious to the public health and its sale constitutes a fraud upon the public. The appellee has made no effort in the present case to attack the findings of Congress by specific evidence. Cf. *Packer Corp.* v. *Utah*, 285 U. S. 105, 111. Such an attempt would involve the burden of demonstrating that by no possibility could the findings of Congress be supported. The evidence upon which Congress itself acted is manifestly more than sufficient to withstand such an attack if any were attempted. "When the action of a legislature is within the scope of its power, fairly debatable questions as to its reasonableness, wisdom and propriety are not for the determination of courts, but for the legislative body, on which rests the duty and responsi-

bility of decision." *South Carolina State Highway Dept.* v. *Barnwell Bros., Inc.*, No. 161, present term, decided February 14, 1938.

Certainly the power to prohibit the sale of filled milk exists in no less degree than the power to prohibit the sale of oleomargarine artificially colored to resemble butter. In *McCray* v. *United States*, 195 U. S. 27, 64, this Court said that "the manufacture of artificially colored oleomargarine may be prohibited by a free government without a violation of fundamental rights." Indeed, it has been held that the use of harmless coloring in oleomargarine may be prohibited even though its similar use in the manufacture of butter is permitted. *Capital City Dairy Co.* v. *Ohio*, 183 U. S. 238, 246.

The argument of appellee is not advanced by suggesting hypothetical attempts to prohibit wholesome articles of food because they are less nutritious than other articles of food with which they may compete. The present case involves a product which is made to resemble milk by the substitution of an inferior ingredient for a vital component of ordinary milk. The Constitution, we submit, does not forbid the States and the Federal Government from preventing such substitution in the case of a food such as milk which has a unique place in the human diet. The argument founded upon a hypothetical extension of the case to other products in other circumstances was nowhere more strongly advanced than in the dissenting opinion

of Mr. Justice Field in *Powell* v. *Pennsylvania*, 127 U. S. 678, 698:

> What greater invasion of the rights of the citizen can be conceived, than to prohibit him from producing an article of food, conceded to be healthy and nutritious, out of designated substances, in themselves free from any deleterious ingredient? * * * Indeed, there is no fabric or product, the texture or ingredients of which the legislature may not prescribe by inhibiting the manufacture and sale of all similar articles not composed of the same materials.

This Court rejected that argument when it was there advanced, and we see no reason why it should not similarly be rejected now.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the District Court should be reversed and the cause remanded with directions to overrule the demurrer.

GOLDEN W. BELL,
Acting Solicitor General.
BRIEN MCMAHON,
Assistant Attorney General.
W. W. BARRON,
PAUL A. FREUND,
Special Assistants to the Attorney General.
WILLIAM J. CONNOR,
WILLIAM GARBOSE,
Attorneys.

FEBRUARY 1938.

APPENDIX A

CONGRESSIONAL COMMITTEE REPORTS

67TH CONGRESS, 1st Session } HOUSE OF REPRESENTATIVES { REPORT No. 355

FILLED-MILK LEGISLATION

AUGUST 19, 1921.—Referred to the House Calendar and ordered to be printed

Mr. VOIGT, from the Committee on Agriculture, submitted the following

REPORT

[To accompany H. R. 8086]

The Committee on Agriculture, to whom was referred the bill (H. R. 8086) to prohibit the shipment of filled milk in interstate and foreign commerce, having considered the same, report it back to the House without amendment, with the recommendation that the bill do pass.

PURPOSE OF THE BILL

During the last five or six years the manufacture of so-called filled milk has assumed considerable proportions in this country, and the bill proposes to prohibit the manufacture of this compound in the District of Columbia, the Territories, and insular possessions, and to prohibit its shipment in

interstate and foreign commerce. Filled milk is defined to mean "any milk, cream, or skimmed milk, whether or not condensed, evaporated, concentrated, powdered, dried, or desiccated, to which has been added, or which has been blended or compounded with any fat or oil other than milk fat, so that the resulting product is in imitation or semblance of milk, cream, or skimmed milk, whether or not condensed, evaporated, concentrated, powdered, dried, or desiccated."

The bill provides a penalty of a fine not exceeding $1,000, or imprisonment for one year, or both, and has the usual provision that the act, omission, or failure of any person acting for or employed by another, within the scope of his employment or office, shall be the act, etc., of the principal, as well as of the agent or employe.

THE COMPOUND

Filled milk is an imitation of condensed or evaporated milk made by mixing condensed skimmed milk and coconut oil. The skimmed milk is reduced by evaporation to about half its bulk, and after this operation there is added from 6 to 8 per cent of coconut fat. The resulting mixture is an exact imitation of pure evaporated or condensed milk; it has the same consistency, the same color, the same taste, and the difference in the two products can only be detected by an expert or by chemical analysis.

The compound can be made more cheaply than the regular article, and, in view of the fact that the imitation is perfect, many people buy it in the belief that they are getting full condensed or evap-

orated milk. According to the testimony of the leading manufacturer, skimmed milk has recently sold for 35 cents per hundred and refined coconut fat at 12 cents per pound. The cost of a quantity of skimmed milk and coconut fat sufficient to fill 48 1-pound cans of the compound is a little over 80 cents, or less than 2 cents per 1-pound can. The retail price of the 1-pound can is from 10 cents up. The Bureau of Markets gives the following figures of the production of the compound in recent years:

	1920	1919	1918	1917
Evaporated, part or full skimmed, modified with foreign fat (case goods)	84,044,000	62,202,225	50,619,163	30,138,262
Evaporated, part or full skimmed, modified with foreign fat (bulk goods)	2,517,000	2,748,120	3,861,097	4,543,648

In 1920 nearly 8,000,000 pounds of coconut fat were used in the manufacture of filled milk, taking the place of that many pounds of butter fat, injuring the market of the American farmer, and bringing his product in competition with a decidedly inferior product produced by oriental and other cheap labor and handled in many instances under shockingly insanitary conditions.

FRAUD ON THE PUBLIC

Filled milk is sold under various trade names, such as "Hebe," "Carolene," "Enzo," "Silver Key," "Nutro," and "Nyko." The manufacturers can not sell it as milk, but it is put up in the same size cans as regular condensed milk, and the evidence before the committee shows that it is advertised by the retail dealers as milk and evaporated milk. Storekeepers sell it with the statements

that "it takes the place of milk," "just as good as condensed and much cheaper," "nothing better on the market," "takes the place of condensed milk." Instances have been found in which the coconut fat was mixed with milk and sold for cream; the compound has been used for making ice cream, and recently a company has been formed at Pittsburgh to manufacture an artificial cream from skimmed or fresh milk and coconut fat. The company states in its prospectus, "we can wholesale our Kream for 100 per cent less than cow's cream and still make a profit of over 100 per cent." In many cases retailers sell the compound for the same price as the straight evaporated milk, although the price per 1-pound can to them is about 3 cents less. A number of surveys in various parts of the country show that the compound is sold largely in sections inhabited by people unable to read English and sections inhabited by people of limited means, and not sold at all in better residential districts. The fact that it is largely sold in the sections mentioned shows that the statements on the label that the article is a compound is not a sufficient protection to the public.

It appears that even the United States Government was defrauded into buying this compound. At Camp Willis, Ohio, in 1913, two carloads of it were furnished at this camp for the use of the troops, and the mess sergeant stated that he had been informed that it was better than milk.

There is ample evidence that the compound is sold at retail as milk, but the interstate shipment can not be prohibited under existing law because the manufacturers label it under a trade name, and

not as milk. There is no doubt that the sale of the compound violates the spirit, if not the letter, of the pure food and drugs act. The act provides (sec. 7) that an article of food shall be considered adulterated "if any substance has been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength," or, "if any substance has been substituted wholly or in part for the article," or, "if any valuable constituent of the article has been wholly or in part abstracted," and shall be considered misbranded (sec. 8) "if it be an imitation of or offered for sale under the distinctive name of another article," but the manufacturers escape under a proviso to section 8 that an article shall not be considered adulterated or misbranded, "in the case of * * * compounds * * * under their own distinctive names, and not an imitation of or offered for sale under the distinctive name of another article." * * *

The regulations prescribed by the Department of Agriculture in pursuance to the pure food and drugs act contain the following:

> Condensed milk, evaporated milk, concentrated milk, is the product resulting from the evaporation of a considerable portion of the water from the whole, fresh, clean, lacteal secretion obtained by the complete milking of one or more healthy cows * * * and contains, all tolerances being allowed for, not less than 25.5 per cent of total solids, and not less than 7.8 per cent of milk fat.

No reason is perceived by the committee why an exact imitation of or substitute for this article should be permitted to be sold to the public which does not meet these requirements.

Dr. McCollum, of Johns Hopkins University, a high authority on the subject of nutrition, testified before the committee that the vitamines, which are absolutely necessary to promote growth in the human body, are found most abundantly in butter fat, and that milk is the chief article of food relied upon for the vitamines. Dr. McCullum demonstrated his contentions before the committee by showing photographs of rats which had been fed experimentally on diets with and without butter fat, and the results obtained were astounding. He said:

> There is no question but what milk is the only food for which there is no effective substitute. It is not a question of whether there is some food value in skimmed milk, as to whether we can not get along in some peculiar situation, that one might not get along if a suitable amount of eggs were included in the diet every day. It is not a question whether technically you can bring before a legislative committee of this sort a situation which might work in a satisfactory manner without this food. But this is the point, that we are educated to use milk. We are a people who for hundreds of generations have depended upon dairy products as a prominent article of our diet. We know how to use it, and we like it. We have an agricultural industry which can not remain a permanent one—there can be no permanent system of agriculture without an animal industry to go with it. * * * We have no deposits of phosphorus and no adequate deposits of calcium that will meet the agricultural needs of this country for ferti-

> lizer. * * * There is no similar property [vitamines] in any vegetable oil, including coconut oil and cottonseed oil, comparable with what you find in butter fat. * * * I guarantee that any infant that is fed for a few weeks on one of these milk substitutes will develop rickets. * * * My suggestion is that we do everything that is in our power to maintain at its full tide an industry so important as the dairy industry, and to bring the American cow into competition with a coconut grove is an injustice.

Dr. E. B. Hart, of the University of Wisconsin, says:

> I have already stated in hearings before legislative committees in our own State that at least 90 per cent of the fat soluble vitamin of whole milk is removed in the modern commercial skimming process. This statement is based upon recent experiments in our laboratory, where refinement of control has been perfected, as contrasted with the older experiments made by Dr. McCollum, which led him to state that there was still about 50 per cent of the fat soluble vitamine in skim milk. Consequently filled milk is not completely devoid of the fat soluble vitamine, but it does not begin to compare with whole milk in respect to its content of this nutritional factor.

In a few years the output of filled milk has grown 5,000 per cent, and the manufacturers frankly stated before the committee that the business is in its infancy. The committee is of the opinion that the traffic in the article should be stopped now, before irreparable injury is done the health of the Nation and before serious damage is done

to the dairying industry. The vast dairying industry of this country is absolutely vital to a proper system of agriculture and to maintaining the fertility of the soil.

The farm and dairying organizations are a unit in opposing the manufacture of this compound. If the business grows, as it will without legislative interference, it will mean a decided decrease in the dairy herds of the country. Instead of vast quantities of whole milk being condensed, the butter fat will be extracted and turned into a comparative oversupply of butter. The oversupply will depress the price, and as the price of milk is regulated by the price of butter fat, the keeping of dairy herds will become less profitable. It is possible that in isolated instances farmers receive more money for their milk where the skimmed milk is manufactured into the substitute, but there can be no question that the introduction of the cheap coconut oil in competition with butter fat is an economic injury to the dairying industry as a whole.

VIEWS OF AGRICULTURAL DEPARTMENT

Dr. C. W. Larson, chief of the dairy division of the department, appeared before the committee and stated that he considered the manufacture of filled milk to be a slight injury to the dairying industry now, but that it would be a decided injury if the manufacture were to increase; that the use of the compound decreases the use of the product of the cow; that by the manufacture of the compound an additional market is not found for the farmers' product; that he was informed by a manager of a company having 156 stores in Washington that the

compound is sold at the same price and for the same purpose as was regular evaporated milk.

> I believe that in a nation that has one outstanding industry like agriculture in this country it is to the interest of all the people of the Nation to develop and further that industry. I further believe that the dairy industry is vitally connected with our whole agriculture. What I mean by that is that dairying is important from the standpoint of the production of wheat and corn and all our other crops. * * * I think it is desirable and important that that industry be maintained and not injured by some imitation.

Dr. C. F. Langworthy, chief of the office of home economics of the department, stated that he would not object to the compound if its use could be limited to the same use that skimmed milk is put, but that he would not approve of it as a substitute for regular milk, either for infants or adults.

OTHER MANUFACTURERS

It is probable that some of the manufacturers of the compound were driven into the business in order to meet competition. Mr. Walter Engels, representing the Borden Co., the largest manufacturer of evaporated milk in the country, stated that—

> His company has always stood for the highest ideals in the production and manufacture and care of milk; and among those ideals is the thought that the public should receive the butter fat in all milk products as the milk comes from the cow. * * * If Congress or the several States do not do

something to stop this competition, our company may be compelled as a matter of necessity to meet this competition to go into the manufacture of it, much as they dislike to do so. * * * Some critics have thoughtlessly argued that the manufacturers of the legitimate article should meet this competition by reducing the price to meet it. * * * There is only one way you can meet it, and that is to go in and make it yourself, and I know that some of these other companies do not want to make this stuff. They were dragged into it to meet competition with their legitimate articles. If Congress would stop the sale of it, I think they would be glad to stop the manufacture of it. * * * The Hebe Co. has applied for registration of its trade-marks in * * * many other countries. * * * That means that they intend to extend this compound business to foreign markets, and when they find out what this stuff is the whole condensed-milk industry is going to get the black eye that the filled-cheese industry got.

For the calendar year 1919 we exported 850,865,414 pounds of condensed milk, and for 1920, 414,250,021 pounds.

CONSTITUTIONALITY

There is nothing new in the proposal that milk products not containing a certain amount of butter fat shall not be transported or sold in interstate or intrastate commerce. Under the pure food and drugs act as it now stands, milk and condensed milk can not be shipped in interstate commerce unless they contain a given percentage of butter fat, and certainly it is proper to insist upon the same

standard in an imitation or substitute article. Congress, by virtue of the pure food and drugs act, has barred from interstate commerce many drugs and articles of food which do not comply with certain standards. It has barred therefrom obscene literature and lottery tickets.

> The power given to Congress by the Constitution over interstate commerce is direct, without limitation, and far-reaching. Congress may adopt not only the necessary but the convenient means necessary to exercise its power over a subject completely within its power, and such means may have the quality of police regulations.

In the lottery cases (188 U. S., 321) the principle was established—

> That it is equally within the power of Congress in regulating interstate commerce to protect the public morals as it is to protect the public health or the economic welfare of the people. (*Hoke* v. *U. S.*, 227 U. S. 308.)
>
> Congress not only has the right to pass laws regulating legitimate commerce among the States and with foreign nations, but also has full power to bar from the channels of such commerce illicit and harmful articles. Congress may itself determine means appropriate to this purpose; and, so long as they do no violence to the other provisions of the Constitution, Congress is itself the judge of the means to be employed in exercising the powers conferred on it in this respect. (*McDermott* v. *Wis.*, 228 U. S., 115.)
>
> Congress is not to be denied the exercise of its constitutional authority over interstate commerce and of its power to adopt means

necessary and convenient to such exercise merely because those means have the quality of police regulations. (*Eckman Alterative Case*, 239 U. S., 510.)

An Ohio statute forbids the manufacture and sale of condensed milk unless made from unadulterated milk from which the cream has not been removed and in which the milk solids are equivalent to 12 per cent of those in crude milk and 25 per cent of them fat, and skimmed milk is permitted to be sold only under certain restrictions. The secretary of agriculture of Ohio in 1918 threatened prosecutions for the sale of Hebe filled milk, and the Hebe Co. brought a suit in equity in the United States District Court in Ohio to restrain the prosecutions. The case went to the United States Supreme Court. (248 U. S., 297.) The court held that the Hebe product fell within the condemnation of the statute; that the statute was a valid exercise of the police power of the State, and that no constitutional right of the Hebe Co. was infringed. The court says:

> But the statute could not direct itself to the product as distinguished from the name more clearly than it does. You are not to make a certain article, whatever you call it, except from certain materials, the object plainly being to secure the presence of the nutritious elements mentioned in the act and to save the public from the fraudulent substitution of an inferior product that would be hard to detect. * * * It seems entirely clear that condensed skimmed milk is forbidden out and out. But if so, the statute can not be avoided by adding a small amount of coconut oil. We may assume that the

product is improved by the addition, but the body of it is still condensed skimmed milk, and this improvement consists merely in making the cheaper and forbidden substance more like the dearer and better one and thus at the same time more available for a fraudulent substitute. It is true that so far as the question of fraud is concerned the label on the plaintiff's cans tells the truth—but the consumer in many cases never sees it.

LEGISLATION IN VARIOUS STATES

While the proposed bill will not prohibit the manufacture and sale of the compound within the limits of a State, the committee is of opinion that a law prohibiting interstate shipment will suppress it, because a sufficient market can not be found without such shipment, and also because a sufficient milk supply can not be found in many States which would warrant engaging in the enterprise.

Furthermore, quite a number of States have already passed laws outlawing the compound. Wisconsin recently passed a law making it unlawful to manufacture it. Utah, Maryland, Florida, California, Colorado, Connecticut, and Oregon have laws either suppressing the compound or providing such stringent regulations as to make its sale impossible. In New York both houses of the legislature passed similar bills, but it failed to go to the governor. In New Jersey a similar bill was vetoed by the governor. In Pennsylvania a bill was passed by the house but died in the senate committee. Ohio has had a law for many years under which the compound was suppressed, and this year a resolution was adopted by the board of health of the City of

New York to the same effect. The department of health—

> Takes this position for the reason that coconut oil does not possess the food value that butter fat possesses and the substitution of same for any milk product would undoubtedly be reflected in the health of the children of this city. Coconut oil is no substitute for milk. Coconut oil does not possess the same growing qualities found in the butter fat of milk, and any legislation which would permit the addition of coconut oil to any milk product would be opposed to the best interests of the people of the city. * * * The board of health of this city has adopted a standard for ice cream in which the use of coconut oil or vegetable fats is prohibited.

MINORITY VIEWS

As a member of the Committee on Agriculture, I earnestly dissent from the views of the majority of said committee as expressed in the report filed herein on H. R. 8086.

The testimony before the committee in extensive hearings proved conclusively that—

1. The "filled milk" complained of, composed of skim milk and vegetable oil, is not unwholesome, deleterious, or injurious to health, but a wholesome and nutritious food. To this statement the proponents of the bill agree.

2. "Filled milk" is properly, clearly, and plainly labeled in compliance with ample existing law, indicating distinctly the uses for which the food is recommended.

3. "Filled milk" is about 3 cents a can cheaper than whole milk, offering an opportunity for thousands of American people limited in finance to purchase this wholesome food at prices within their reach, when the world demand is to reduce the cost of necessities.

4. The manufacture of "filled milk" does not injure the dairy business, but, on the contrary, last year created a market for 200,000,000 pounds of skim milk which formerly had no market value whatever.

It would be monstrous for the Congress, as proposed by this bill, to legislate out of existence any legitimate business, heedless of the millions honestly invested.

This bill is of doubtful constitutionality. If the retailers practice any deception the remedy is regulation of the distributors and not destruction of private business.

Believing that the Government should not destroy any legitimate business, that there is no demand for this legislation except from those selfishly interested in removing competition, and that the sentiment of the public is in harmony with these views, I recommend that this bill be not passed.

J. B. ASWELL.

Calendar No. 963

67TH CONGRESS, 4th Session } SENATE { REPORT No. 967

FILLED MILK LEGISLATION

JANUARY 3 (calendar day, JANUARY 4) 1923.—Ordered to be printed

Mr. LADD (for Mr. NORRIS), from the Committee on Agriculture and Forestry, submitted the following

REPORT

[To accompany H. R. 8086]

The Committee on Agriculture and Forestry, to whom was referred the bill (H. R. 8086) to prohibit the shipment of filled milk in interstate or foreign commerce, having considered the same, report favorably thereon with certain amendments, and, as amended, recommend that the bill do pass.

Your committee recommend a slight change in the wording of the bill as passed by the House of Representatives, which does not change its meaning or purpose, and the insertion of appropriate language to permit the shipment in interstate and foreign commerce of proprietary food compounds designed and prepared solely for feeding infants and young children. The House bill as amended follows, with matter to be omitted struck through, and matter to be inserted appearing in italics:

AN ACT to prohibit the shipment of filled milk in interstate or foreign commerce

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That whenever used in this act—

(a) The term "person" includes an individual, partnership, corporation, or association:

(b) The term "interstate or foreign commerce" means commerce (1) between any State, Territory, or possession, or the District of Columbia, and any place outside thereof; (2) between points within the same State, Territory, or possession, or within the District of Columbia, but through any place outside thereof; or (3) within any Territory or possession, or within the District of Columbia; and

(c) The term "filled milk" means any milk, cream, or skimmed milk, whether or not condensed, evaporated, concentrated, powdered, dried, or desiccated, to which has been added, or which has been blended or compounded with, any fat or oil other than milk fat, so that the resulting product is in imitation or semblance of milk, cream, or skimmed milk, whether or not condensed, evaporated, concentrated, powdered, dried, or desiccated~~, and as such is an adulterated and deleterious article of food, and when marketed as such constitutes a fraud upon the public.~~ *This definition shall not include any distinctive proprietary food compound not readily mistaken intesta for milk or cream or for evaporated, condensed, or powdered milk or cream, provided that such compound (1) is prepared and designed for feeding infants and young children and customarily used on the order of a physician; (2) is packed in individual cans containing not more than 16½ ounces and bearing a label in bold type that the content is to be used only for said purpose; (3) is shipped in interstate or foreign commerce exclusively to physicians, wholesale and retail druggists,*

orphan asylums, child welfare associations, hospitals, and similar institutions and generally disposed of by them.

SEC. 2. *It is hereby declared that filled milk, as herein defined, is an adulterated article of food, injurious to the public health, and its sale constitutes a fraud upon the public.* It shall be unlawful for any person to manufacture within any Territory or possession, or within the District of Columbia, or to ship or deliver for shipment in interstate or foreign commerce, any filled milk.

SEC. 3. Any person violating any provision of this act shall, upon conviction thereof, be subject to a fine of not more than $1,000 or imprisonment for not more than one year, or both; except that no penalty shall be enforced for any such violation occurring within thirty days after this act becomes law. When construing and enforcing the provisions of this act, the act, omission, or failure of any person acting for or employed by any individual, partnership, corporation, or association, within the scope of his employment or office, shall in every case be deemed the act, omission, or failure of such individual, partnership, corporation, or association, as well as of such person.

WHAT IS FILLED MILK?

It is a compound of skimmed milk and coconut oil. The manufacturers buy the whole milk, separate the butter fat, and sell the latter for cream or use it in the manufacture of butter. The skimmed milk is then mixed with from 3 to 4 per cent coconut oil, and this mixture is then reduced by evaporation to about half its bulk. The coco-

nut oil is reduced in bulk very little, if any, by the process of evaporation, so that when the compound is ready for canning it consists of skimmed milk reduced to about half its bulk, and, as the coconut oil was not reduced in the process of evaporation, from 6 to 8 percent of the oil. The compound is an exact imitation of evaporated milk, in color, consistency, smell, and taste, and the difference between it and evaporated milk can only be ascertained by chemical analysis. The compound can be manufactured for less than half of the cost of evaporated milk. The Bureau of Agricultural Economics, United States Department of Agriculture, furnishes the following figures showing the production of filled milk:

[Expressed in pounds]

Year	Canned	Bulk	Total
1916	12,000	14,134,712	14,146,712
1917	18,504	17,489,064	17,505,568
1918	41,033,855	7,591,182	48,625,037
1919	62,262,221	2,748,120	65,010,341
1920	64,044,000	2,517,000	66,561,000
1921	59,020,000	5,873,000	64,893,000

METHOD OF LABELING AND MARKETING

The pure food and drugs act (sec. 7) provides that an article of food shall be considered adulterated "if any substance has been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength," or "if any substance has been substituted wholly or in part for the article," or "if any valuable constituent of the article has been wholly or in part abstracted," and shall be considered misbranded (sec. 8) "if it be an imita-

tion of or offered for sale under the distinctive name of another article." However, section 8 of this act has a proviso under which the manufacturers of filled milk claim the right to manufacture it, to the effect that an article shall not be considered adulterated or misbranded "in the case of * * * compounds * * * under their own distinctive names, and not an imitation of or offered for sale under the distinctive name of another article."

The manufacturers of filled milk do not label their cans as "milk," as that would be a violation of the act, but use such trade names as "Hebe," "Carolene," "Majal," "Nutro," "Enzo," "Nyko," "Silver Key." The compound is put up in the same size and style of cans as the genuine evaporated or condensed milk and is carried by the retail dealers on the shelves side by side with the genuine product. Your committee does not doubt that the sale of filled milk as at present carried on is a violation, if not of the letter, of the spirit of the pure food and drugs act. This act can not regulate the conduct of the retail dealer. He can buy this compound for about 3 cents per 1-pound can less than he is obliged to pay for the genuine article. Many instances were brought to the attention of your committee where retail dealers advertised the compound as "Hebe milk," "Silver Key milk," etc., and investigations conducted in many of our large cities reveal that the dealers were selling the compound as being as good and better than regular evaporated milk. It was shown that the compound was largely sold in sections of cities inhabited by people unable to read the label and people of limited means.

One of the great dangers incident to the marketing of filled milk lies in the bulk sales. The statistics for the past year show that the sale in bulk is now on the increase. When used in hotels and restaurants and for making ice cream, the consumer has no means of knowing what he is getting, and a label could not protect against fraud in such a case. If bulk shipments should be allowed, commercial chemists may discover a method by which the compound in bulk may be refilled into cans for retail sales within the limits of a State, and thus the whole object of the legislation might be frustrated.

EFFECT ON THE PUBLIC HEALTH

In recent years scientists have discovered food elements known as "vitamines" which are highly essential to the growth and well-being of the human body. It has been found that such diseases as rickets, scurvy, serious eye diseases, beriberi, and even tuberculosis, may be traced to the lack of vitamines in the diet; in fact, the lack of vitamines reduces the whole vitality of the body and invites disease. Our chief source of the vitamines is milk, and the vitamines are found almost wholly in the butterfat of the milk. Four distinct kinds of vitamines have been discovered. The extraction of the butterfat from the milk seems to leave in the skimmed milk only a trace of so-called vitamine A. The experiments of such experts as Doctor McCollum, of Johns Hopkins University, and Doctor Hart, of the University of Wisconsin, show in the striking way the lack of vitamines in the diet. It has been found, for instance, that rats fed on a ration consisting of 60 percent oats, 1 percent salt, 1½ percent lime, 15 percent dextrin, 22.5 percent

evaporated milk, grew in a natural and healthy way, whereas rats fed on the same diet, substituting filled milk for the evaporated milk, grew in the same time to but half the size, had bodily deformities, contracted a fatal eye disease and died within about 50 days after the experiment began.

Vitamines are not produced by the cow, but are found in her food and concentrated in the milk. The human body does not produce them, but must receive them in the food. It follows, therefore, that a nursing mother who does not receive sufficient vitamines in her diet can not transmit healthful milk to her offspring. It is a curious fact that all vegetable oils and fats are wholly lacking in vitamines. It is a fact that there is in the United States considerable undernourishment of the population, especially in our larger cities. This would appear to be due in part at least to the fact that in our preparation of food for the market we have extracted at least in part valuable mineral elements and vitamines. It is therefore all the more necessary that we supply the vitamines in the milk. Milk is the one chief food of the Nation, and no adulteration of it or substitution for it should be permitted.

While there are now over a dozen brands of filled milk on the market, only one manufacturer has attempted to restrict the sale of the compound for certain uses. Your committee is of the opinion that it is impossible to prevent fraudulent use and sale of this compound, on account of the incentive of additional profit held out to the retail dealers, and no doubt in many cases due to the fact that the retailers themselves do not know wherein the compound differs from the genuine evaporated milk.

The Hebe Co. does label its cans to the effect that the contents should not be used for infant feeding, but your committee is informed that mothers have written the company informing it that they had been feeding infants on "Hebe." The manufacturers of "Hebe" recommend their product for use in cocoa, soups, gravies, bread, etc., but it is evident that when children are so fed in place of with milk the consumer fails to receive the proper elements of nutrition.

Your committee has provided for an exception in case of compounds designed wholly for the feeding of infants. The exception is carefully worded so that under it filled milk can not be shipped in interstate commerce. There are cases in which whole cow's milk is not acceptable to an infant, and where it has been found that compounds of skimmed milk, cocoanut oil, cod liver oil (rich in vitamines) and other ingredients may be more acceptable. These infant foods are in nearly every case used on the advice of a physician.

COUNTER ARGUMENTS

The manufacturers of filled milk were given every opportunity to establish their claims before the committee. Their chief arguments are: (1) That the proposed legislation is the result of a trade war between manufacturers of milk products; (2) that the compound is wholesome; (3) that the manufacture of it affords the farmer an additional market for skimmed milk; (4) that their use is a convenience and an economy to the users; (5) that the compounds are accurately labeled and sold by the manufacturers for what they are; (6) that the bill is unconstitutional.

Commenting on these claims, we wish to say:

(1) The author of the bill informed the committee that he had no benefit or detriment to any manufacturer in mind when drawing the bill, and did not communicate with, directly or indirectly, any manufacturer of filled or evaporated milk; that his only motive was to protect the public health and the dairy industry.

(2) There is no claim that the compound in and of itself is unwholesome. If used by the consumer in limited quantities, with an exact knowledge of its deficiencies, and the ability to supply these deficiencies, there would be little harm in its use. But we fear that such a condition does not obtain in practice, and are convinced that the use of the compound, as it is and will be sold, unless protected, is injurious to the public health.

(3) The claim that an additional market is found by the manufacture of this compound for the farmer's skimmed milk is not well founded. Even if this claim could be substantiated, it would in the judgment of the committee, be no justification for its manufacture. However, the evidence shows that the skimmed milk used in filled milk should be used within an hour of the separation process. The skimmed milk coming from the average creamery and cheese factory, therefore, can not be used at a filled-milk plant on account of the delay due to transportation. Moreover, opponents of the measure were unable to demonstrate to the committee any uses for the compounds which were different from or additional to the uses of whole milk. It is therefore logical to conclude that, since there is approximately an equal amount of

skimmed milk in a can of evaporated milk to that in a can of the compound, the skimmed milk consumed would be the same and the skim affords a cheap medium through which a market is found for a more expensive fat. Opponents inferred that fat was the medium used to market the skimmed milk. This, of course, was not sustained, since the value of 100 pounds of skimmed milk was shown to be from 35 to 50 cents, while the value of 4 pounds of coconut oil would be approximately 48 cents, and the value of 4 pounds of butter fat would be approximately $1.72, at the time that the hearings were held. It must be apparent that the manufacturer of the compound is seeking greater profits by the substitution of cheaper, less digestible, and inferior fats for the growth-producing butter fat. It was also demonstrated to your committee by competent witnesses that there is not as much waste of skimmed milk as people generally imagine. In the creamery and cheese-factory districts skimmed milk is generally made into cottage cheese or is sent back to the farm, where it serves a very useful purpose in supplementing live-stock rations, and it is in these districts where most of the skimmed milk is produced.

(4) As to the convenience and economy in the use: There is no purpose for which filled milk is used where evaporated or condensed milk will not do as well or better. The genuine article can be obtained in any store which carries the compound. There is no shortage of evaporated milk. As to the economy, it appears that in hundreds of stores in the country the filled milk was sold for the same price as the evaporated, sometimes even at a higher

price and sometimes at a slightly lower price. Even if it is conceded that the filled milk is sold cheaper, there is no economy, because the buyer at the reduced price is not getting his money's worth.

(5) The question of labeling has already been touched upon. It is impossible for the public to know what the valuable ingredients are which have been extracted from the contents, even with a thorough reading of the label.

(6) The question of constitutionality was not seriously pressed before the committee. We are thoroughly satisfied that Congress has the power to exclude from interstate and foreign commerce any article which is in the exercise of fair judgment injurious to the public health. Under the pure food and drugs act Congress has barred many drugs and foods considered below certain standards, and this bill may rightly be considered in the nature of an amendment to that act. In the *Lottery* cases (188 U. S. 321) it was held that—

> It is equally within the power of Congress in regulating interstate commerce to protect the public morals as it is to protect the public health or the economic welfare of the people.
>
> Congress not only has the right to pass laws regulating legitimate commerce among the States and with foreign nations, but also has full power to bar from the channels of such commerce illicit and harmful articles. Congress may itself determine means appropriate to this purpose, and, so long as they do no violence to the other provisions of the Constitution, Congress is itself the judge of the means to be employed in exercising the powers conferred on it in this respect. (*McDermott* v. *Wisconsin*, 228 U. S. 115.)

Other cases on the subject are: *Hoke* v. *U. S.*, 227 U. S. 308; *Eckmann Alterative* cases, 239 U. S. 510; *Hebe Milk* case, 248 U. S. 297.

STATE LEGISLATION

Eleven States now have laws either prohibiting entirely the manufacture and sale of filled milk or restricting the business in such a way as to make the commercial exploitation impossible. These States are: Utah, Maryland, Florida, California, Colorado, Connecticut, Oregon, Ohio, New York, New Jersey, Wisconsin. In Ohio, Maryland, and Wisconsin the legislation has been upheld by Supreme Court decisions. The Wisconsin decision is the latest, and may be found in the hearings.

ECONOMIC CONSIDERATIONS

The manufacturers of filled milk frankly claim that the business is in its infancy. It is reasonable to assume that in the absence of State legislation and campaigns of education conducted in respect to the compound, its sale now would run into the hundreds of millions of pounds per year. No doubt more filled milk has been manufactured in this country than has been officially reported. It appears that during the present year a large manufacturer of evaporated milk in New York put out vast quantities of filled milk intended for domestic consumption labeled as "evaporated." Our attention has been called to a shipment of 3,000 cases of milk to New York, intended for export, labeled as "evaporated," which was found on chemical analysis in Germany, where part of it was shipped, to be "filled." Some 30 years ago our export trade

in cheese was ruined by the manufacture in this country of "filled cheese," and we are in danger of having suspicion cast on our large exports of evaporated and condensed milk by what is now a comparatively small amount of filled milk. When we consider that in 1918 we exported 551,000,000 pounds of evaporated and condensed milk, of a value of $72,000,000; that in 1919 we made over two billion pounds, exported about 850,000,000 pounds, of a value of $121,000,000; that in 1920 we made about a billion and a half pounds and exported over 400,000,000 pounds, of a value of $65,000,000, we can not afford to let a few manufacturers in this country for an additional profit to them strike a blow which will do irreparable injury to our entire dairying industry. Dairying represents the highest point reached in farm economy. Wherever dairying is extensively practiced, the entire community reflects its benefits.

The National Agricultural Conference called in Washington at the instance of President Harding January 23 to 27, 1922, passed resolutions couched in the following language:

> The manufacture, sale, and use as food of compounds, consisting of milk from which the butterfat has been taken and oriental vegetable oils substituted therefor, is a growing menace to the public health and threatens to undermine the dairy industry of the United States. Investigations have shown that the pure food and drugs act does not give the public the necessary protection against these compounds, and that additional Federal and State legislation is desirable. We therefore urge the enactment of a Federal law to prohibit the introduction

> into interstate commerce of compounds of vegetable oils and skimmed milk, or products made in the semblance of milk. We further urge the passage by the various States of additional legislation prohibiting the manufacture or sale of such imitation compounds, and close cooperation between Federal and State enforcement authorities in the detection and prosecution of violators of such laws.

Dr. William G. Geis, head of the department of biological chemistry, of the College of Physicians and Surgeons, Columbia University, New York City, when legislation for prohibiting the sale of filled milk was before the New York Legislature, made the following statement:

> I am in favor of prohibiting the manufacture and sale of filled milk. There is no economic necessity in our country for this imitation and debasement of pure evaporated milk. There is a biological function of butter fat which can not be supplied by any vegetable fat in combination with skimmed milk. The growth of their bodies, the quality of their teeth, and the health of the children depend largely upon the milk in the diet. There is no evidence of any satisfactory substitute. There is every evidence against this invasion of cheap vegetable fat.

The civilization of our country is dependent upon the dairying industry. We should do everything possible to encourage it. We need it to preserve the fertility of our soil, and the time to prohibit the filled-milk traffic is now, before it has done greater damage to our health or to one of our basic and indispensable industries.

APPENDIX B

State Legislation

The following states, thirty-eight in number, have enacted laws prohibiting or regulating the sale of filled milk. Generally speaking, the laws in question are of three kinds: (1) Laws which specifically prohibit the manufacture and sale of filled milk. Thirty-one states have or have had statutes of this kind. (2) Laws which prescribe standards for condensed milk which outlaw filled milk. There are three states the laws of which fall in this category. (3) Laws which impose conditions and regulations upon the manufacture and sale of filled milk. There are three such statutes listed.

In addition to the statutes referred to below, each of the states and the United States have statutes which make it unlawful to adulterate milk or to add any foreign substance to milk.

ALABAMA

Section 51, Art. 8, Agricultural Code, 1927, makes unlawful the manufacture and sale of filled milk.

ARIZONA

The manufacture and sale of filled milk has been made illegal since 1931, Sec. 943Y, Revised Code 1931; L., 1931, c. 82, Sec. 41.

ARKANSAS

In 1925 an act was approved making it unlawful to manufacture or sell filled milk, Act of March

21, 1925, Sec. 1; Crawford and Moses Digest, 1927, sec. 4827–A; Pope's Digest, 1937, sec. 3103.

CALIFORNIA

The manufacture and sale of filled milk has been illegal since 1919. The law in its present form was approved in 1931 and has never been declared invalid. Agricultural Code, sec. 476, statutes and amendments to codes 1933, p. 134; Codes, laws, etc. (Deering), 1933 Supp., Title 149, Act 1943, p. 1302, and see amendment, same reference, sec. 476, p. 881.

COLORADO

In 1921 Colorado adopted a law providing certain standards for condensed milk manufactured or sold in that state. L. 1921, Act of April 5, 1921, c. 97, sec. 10, p. 250.

CONNECTICUT

Sec. 2487, c. 135, General Statutes, 1930, makes the manufacture and sale of filled milk illegal; Act of May 23, 1923, c. 188, p. 3611.

DELAWARE

Sec. 649, Revised Code, 1935, prohibits the manufacture and sale of filled milk.

FLORIDA

Sections 3216 and 7676, Compiled General Laws, 1927, prescribed certain standards for condensed milk manufactured or sold within that sate. L. 1911, c. 6203, secs. 2, 3.

GEORGIA

The sale of filled milk is made unlawful by Section 42–511, Geo. Code, 1933; L. 1929, Act of August 28, 1929, pt. 1, Title 7, sec. 10, p. 287.

IDAHO

The manufacture and sale of filled milk is made illegal by c. 36, secs. 502–504, 1932 Code; L. 1923, Act of February 21, 1923, c. 37, p. 43.

ILLINOIS

Section 19–A of c. 56½ of Smith-Hurd Annotated Statutes, approved in 1923, prohibits the manufacture and sale of filled milk. This statute was declared unconstitutional in 1931 in the case of *People* v. *Carolene Products Company,* 345 Ill. 156. In 1935 the Filled Milk Law was amended by adding sec. 19–E, to again prohibit the manufacture and sale of filled milk. This amendment was held unconstitutional in December 1936, in the case of *Carolene Products Company* v. *McLaughlin,* 365 Ill. 62. See Cahill's Ill. Revised Statutes, Act of June 21, 1923, c. 56b, sec. 19 (1), p. 1466 and Amendment, Act of July 19, 1935. See Jones Ill. Statute Annotated, 1936 Supp., c. 53, sec. 20 (1), (2), (3), i. e., 53.020 (1), (2), (3).

INDIANA

In 1925 this state adopted a statute making illegal the manufacture and sale of filled milk. Burns Statutes 1926, sec. 3657. This Act was repealed in 1929, c. 212, p. 8, and a tax imposed upon a sale of filled milk, Burns Statutes, 1933, Secs. 35–1320, 1; L. 1929, c. 212, sec. 2, p. 717.

IOWA

Sec. 3062 of the 1935 Code prohibits the manufacture and sale of filled milk. Act of March 28, 1923, c. 44, sec. 1, 2, 3, and 4, p. 43.

KANSAS

The manufacture and sale of filled milk is made illegal by c. 65, sec. 707, General Statutes, 1935. Act of March 31, 1927, c. 242, sec. 8; See also Revised Statutes 1923, 65–713.

MARYLAND

Sec. 281 of the Annotated Code imposes restrictions upon the manufacture and sale of evaporated milk in Maryland which would make it unlawful for the respondent to manufacture or sell its products in that state. This law was approved in 1900 and was held valid in the year 1909—*Reiter* v. *State,* 109 Md. 235; 71 Atl. 975. See Act of April 7, 1900, c. 459, sec. 138, c and d.

MASSACHUSETTS

The Act of March 23, 1923, c. 170, p. 157 makes it unlawful to manufacture or sell filled milk made by adding fat or oil other than butter fat. It was held in *Carolene Products Company* v. *Mahoney,* 294 Fed. 902, 2 F. (2d) 366, that the statute did not apply to "Carolene" which was then a mixture of skimmed milk and egg yolk. "Carolene" is now a mixture of skimmed milk and cocoanut oil and within the prohibition of the act. See sec. 17–A, c. 94, Annotated Laws, 1923.

MICHIGAN

The manufacture and sale of filled milk was prohibited by Sec. 5358, Compiled Laws, 1929. This statute passed in 1923 was in full force and effect until 1936 when it was declared unconstitutional by the Michigan Supreme Court in the case of *Carolene Products Company* v. *Thompson,* 276 Mich. 172; 267 N. W. 608. L. 1923, Act of April 6, 1923, Public Act No. 23, p. 43.

MINNESOTA

In 1923 Minnesota adopted a statute making it unlawful to manufacture or sell filled milk. Mason's Statute 1927, sec. 3926; L. 1923, c. 126, sec. 1; Amended, 1925, c. 203.

MISSOURI

The manufacture and sale of filled milk is prohibited by sections 12408 to 12413, Revised Statutes, 1929. This Filled Milk Law was approved in 1923 and has been in full force and effect since that time. On February 15, 1936, in the case of *Poole and Creber Market Co.* v. *Breshears, Commissioner of Agriculture,* in the Circuit Court of Cole County, the court held the Missouri Filled Milk Law constitutional.

MONTANA

Revised Code, Anderson and McFarland, 1935, c. 240, sec. 2620.39 makes the manufacture and sale of filled milk unlawful. L. 1929, Act of March 11, 1929, c. 93, sec. 34, p. 170.

NEBRASKA

Sec. 81–1022, Compiled Statutes, 1929, approved in 1923, makes the sale and manufacture of filled milk unlawful in the state of Nebraska. This statute was in full force and effect until 1936, when the Supreme Court of Nebraska in the case of *Carolene Products Company* v. *Banning,* 131 Neb. 429; 268 N. W. 313, held the law unconstitutional.

NEW HAMPSHIRE

The manufacture and sale of filled milk in N. H. has been prohibited since 1923, Act of April 12, 1923, c. 36, sec. 2; Public Laws of N. H. 1926, Vol. 1, c. 163, sec. 37, p. 619.

NEW JERSEY

In 1922 N. J. adopted a statute prohibiting the manufacture and sale of filled milk. Compiled Statutes, 1911–1924, sec. 8I–8j, p. 1400; L. 1922, Act of March 11, 1922, c. 110, sec. 3, pp. 198, 199.

NEW MEXICO

Sec. 125–104, 108 Annotated Statutes, 1929, approved in 1927, probably makes the sale of filled milk unlawful. L. 1927, Act of March 14, 1927, c. 97, sec. 4, 8.

NEW YORK

The manufacture and sale of filled milk in New York is made unlawful by sec. 60, c. 1, Cahill's Consolidated Laws, 1930; L. 1922, Act of March 30, 1922, c. 365, sec. 64 (3).

NORTH DAKOTA

In 1925 a law was approved prohibiting the manufacture and sale of filled milk. See Compiled Laws 1913–1925, c. 38, sec. 2855 (a) 1; L. 1925, Act of March 6, 1925, c. 3, sec. 1, p. 9.

OHIO

Sec. 12725, Page's General Code imposes certain restrictions on the sale and manufacture of condensed milk which makes it unlawful for the respondent to do business or sell its products in that state. This statute has been in full force and effect since 1915. In 1919 the statute was held to be constitutional and to prohibit the manufacture and sale of filled milk, *Hebe Company* v. *Shaw,* 248 U. S. 297.

OREGON

The manufacture and sale of filled milk is not entirely prohibited in this state, but very strict regulations are imposed by the 1930 Code, Vol. 2, c. XII, sec. 41–1208–1210, p. 3281; L. 1921, Act of February 26, 1921, c. 372, sec. 1–3.

PENNSYLVANIA

Sections 553 and 582, Title 31, Purdon's Statutes, 1936, makes unlawful the manufacture and sale of filled milk. These statutes were adopted in 1923 and were held constitutional by the Supreme Court of Pennsylvania in *Carolene Products Company* v. *Harter, Director of the Bureau of Foods,* not yet reported. L. 1923, Act of June 29, 1923, No. 361, p. 929.

SOUTH DAKOTA

In 1923 an act was approved making it unlawful to manufacture or sell filled milk; Compiled Laws, 1929, c. 192, sec. 7626–O, p. 2493; L. 1923, Act of March 12, 1923, c. 192, sec. 1, p. 177.

TENNESSEE

The manufacture and sale of filled milk has been prohibited since 1923. Williams Code, 1934, c. 15, sec. 6549, 6551; L. 1923, Act of March 31, 1923, c. 88, sec. 2–4, p. 331.

TEXAS

In 1935 there was adopted a statute prohibiting the manufacture and sale of filled milk. L. 1935, Act of May 17, 1935, Vol. 1, c. 310, p. 717; Vernon's Penal Code, Title 12, c. 2, Art. 713 (a), pp. 20, 21.

UTAH

Sec. 3–10–59.60, Revised Statutes, 1933, approved in 1921, imposes certain conditions upon the manufacture and sale of filled milk. L. 1921, Act of March 22, 1921, c. 45, sec. 1–3, p. 119.

VERMONT

The Act of February 10, 1925, No. 104, L. 1925, p. 142, prohibits the manufacture and sale of filled milk. Public Laws 1933, Title 34, c. 303, sec. 7724, p. 1288.

VIRGINIA

Section 1197–C. 1930 Code, prohibits the manufacture and sale of filled milk. Laws 1924, Act of February 5, 1924, c. 7, p. 7.

WASHINGTON

The manufacture and sale of filled milk is subject to strict regulations and conditions in this state and cannot be purchased by or used in institutions which receive any support from the state. Remington's Revised Statutes, Vol. 7, Title 40, c. 13, sec. 6206, 07, 13, and 14, p. 360. Laws 1919, Act of March 20, 1919, c. 192, sec. 44, 45, 51, 52, p. 636.

WEST VIRGINIA

The manufacture and sale of filled milk is prohibited by section 2036, 1932 Code. L. 1923, Act of April 26, 1923, c. 56, sec. 30, p. 183.

WISCONSIN

In 1921 this state adopted a law prohibiting the manufacture and sale of filled milk which was held constitutional by the Supreme Court of Wisconsin in 1922, in the case of *State* v. *Emery*, 178 Wisc. 147; 189 N. W. 564. Wisc. Statutes, 11th Ed. 1931, c. 98, sec. 98.07, p. 606, L. 1921, Act of June 21, 1921, c. 409.

U. S. GOVERNMENT PRINTING OFFICE: 1939

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 640

THE UNITED STATES OF AMERICA,
Appellant,

vs.

CAROLENE PRODUCTS COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS.

GEORGE N. MURDOCK,
Counsel for Appellee.

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IN THE

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS

No. 3489

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

CAROLENE PRODUCTS COMPANY, A CORPORATION,
Defendant.

OPPOSITION OF APPELLEE TO THE GRANTING OF APPEAL.

Comes now the CAROLENE PRODUCTS COMPANY, appellee herein, by its attorney, GEORGE N. MURDOCK, and files this its opposition to the granting of the appeal prayed for by appellant and for its reasons for such opposition states:

1. The Government seeks this appeal under the provisions of Title 18, Sec. 682 of the United States Code, which in part reads as follows:

> "Provided, that no writ of error shall be taken by or allowed the United States in any case where there has been a verdict in favor of the defendant."

The record shows that nearly two years prior to the return of the indictment in this case all questions involved herein had been decided in the decision of Judge FitzHenry,

which decision was adopted by the court as his reason for sustaining the demurrer herein, and which is sought to be reversed by this appeal. This former decision settled every point in issue here in favor of appellee. The decision was not appealed, and therefore became the law of the case, and made the question *res adjudicata.*

Gould v. *Evansville & C. R. R. Co.,* 91 U. S. 526, 532, 23 L. Ed. 416, 418, 419;

Alley v. *Nott,* 111 U. S. 472, 476, 28 L. Ed. 491, 492.

2. The sustaining of the demurrer to the first indictment became a final determination of the rights of the parties, and a bar to the indictment now before this court. (Id.)

Frank v. *Mangum,* 237 U. S. 309, 334, 59 L. Ed. 969, 983;

U. S. v. *Oppenheimer,* 242 U. S. 85, 87, 61 L. Ed. 161, 164.

3. The Government, not having been properly before the Court with the indictment in this case should not be allowed to appeal to the United States Supreme Court on a question and in a case which it was estopped from bringing.

Bissell v. *Spring Valley Township,* 124 U. S. 225, 31 L. Ed. 411.

4. This opposition to appeal involves the right of a citizen to rely upon a judgment in his favor and to be free from a further indictment for the same offense brought by the Government for the sole purpose of taking an appeal to the United States Supreme Court, every point involved in the second indictment having been ruled upon on a demurrer in the first case.

5. A demurrer is equally conclusive as a verdict would be and the facts then established can never be contested again between the same parties.

Gould v. *Evansville & C. R. R. Co.*, 91 U. S. 526;
Coffey v. *U. S.* 116 U. S. 436, 445, 29 L. Ed. 680;
Bissell v. *Spring Valley Township*, 124 U. S. 225, 31 L. Ed. 411;
Frank v. *Mangum*, 237 U. S. 309, 334, 59 L. Ed. 969, 983;
U. S. v. *Oppenheimer*, 242 U. S. 85, 87, 61 L. Ed. 161, 164.

WHEREFORE, appellee, having shown that the appellant was not properly before the court below, asserts that appellant could not be properly before the Supreme Court of the United States and hence the United States Supreme Court has no jurisdiction over such a matter, and therefore prays that the appeal be dismissed.

GEORGE N. MURDOCK,
Attorney for Appellee,
111 West Monroe St.,
Chicago, Illinois.

FILE COPY

No. 640

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

THE UNITED STATES OF AMERICA, APPELLANT

v.

CAROLENE PRODUCTS COMPANY, APPELLEE

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS

BRIEF FOR THE CAROLENE PRODUCTS COMPANY

GEO. N. MURDOCK
14 W. Monroe St.
Chicago, Ill.
Counsel for Appellee

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS

BRIEF FOR THE CAROLENE PRODUCTS COMPANY

STATEMENT

The facts as set out in Appellant's brief require some slight elaboration and comment. The first count of the indictment charges the shipment in interstate commerce from Illinois to Missouri, by defendant, of an adulterated article of food, injurious to the public health, a product of condensed and concentrated skimmed milk to which had been added a fat or oil other than milk fat, to wit cocoanut oil so that the resulting product "Milnut" was

in imitation of and semblance of milk, cream, skimmed milk, and concentrated milk. The second count is practically the same except that the product was known as "Carolene" and the shipment was to other consignees.

While the decision appealed from is in form, that of Judge Adair, rendered October 19, 1937, it is in fact an appeal from the decision of Judge Louis Fitzhenry rendered 1934, adopted by Judge Adair. The violations charged against appellee were the same in each case, the indictment now before this court being a device adopted by the government to appeal from a decision rendered three years earlier, and under the protection of which appellee had been operating.

STATUTES

The statute, the constitutionality of which is at issue, has been accurately quoted in Appellant's brief, p. 2, 3, 4.

SUMMARY OF ARGUMENT

1. Similar state statutes have recently been held void by state supreme courts as prohibiting healthful, wholesome, harmless foods. The statute is not a regulation but a prohibition, invading the powers reserved to the states to legislate with respect to health and fraud, and exceeds the limitations placed on Congress by the Constitution. It does not deal with an evil or injurious subject, and, has no relation to the preservation of the health, morals or safety of the public, but is the result of skillfully directed agitation by competitors. The compounds prohibited are neither adulterated nor misbranded under the general laws and fraud will never be presumed. Compounds of

the same ingredients are recognized as proper subjects for transportation and are permitted when in imitation or semblance of butter.

2. The statute violates the due process of law provisions of the Constitution, is a special law, a legislative judgment and decree and an arbitrary exertion of legislative power, usurping the functions of the court and jury, and containing a conclusive presumption as to adulteration, injury to health and fraud.

3. The statute is invalid in that the classification which it makes in forbidding the shipment in interstate commerce of the compound or mixture of milk and animal or vegetable fats in the imitation and semblance of milk but not forbidding such transportation of mixtures and compounds of milk and animal or vegetable fats in imitation or semblance of butter is arbitrary and unreasonable and deprives defendant of its property without due process of law.

4. Appellant has sought to confine the application of the statute to compounds of "skimmed milk" while, in fact, it relates to compounds of cream, milk, or skimmed milk in any form. Substitutes for every necessity of life are common and desirable. Vitamins are subjects of controversy and no standard for vitamins has ever been attempted by statute. Hebe v. Shaw is not applicable to the interpretation of a federal law as it set a standard for State not Federal statutes. The statute was passed by powerful majorities to eliminate competition and not for the preservation of the health, safety or comfort of the public.

ARGUMENT

I

SIMILAR STATE STATUTES HAVE RECENTLY BEEN HELD VOID BY STATE SUPREME COURTS AS PROHIBITING HEALTHFUL, WHOLESOME, HARMLESS FOODS. THE STATUTE IS NOT A REGULATION BUT A PROHIBITION, INVADING THE POWERS RESERVED TO THE STATES TO LEGISLATE WITH RESPECT TO HEALTH AND FRAUD, AND EXCEEDS THE LIMITATIONS PLACED ON CONGRESS BY THE CONSTITUTION. IT DOES NOT DEAL WITH AN EVIL OR INJURIOUS SUBJECT, AND HAS NO RELATION TO THE PRESERVATION OF THE HEALTH, MORALS OR SAFETY OF THE PUBLIC, BUT IS THE RESULT OF SKILLFULLY DIRECTED AGITATION BY COMPETITORS. THE COMPOUNDS PROHIBITED ARE NEITHER ADULTERATED NOR MISBRANDED UNDER THE GENERAL LAWS AND FRAUD WILL NEVER BE PRESUMED. COMPOUNDS OF THE SAME INGREDIENTS ARE RECOGNIZED AS PROPER SUBJECTS FOR TRANSPORTATION AND ARE PERMITTED WHEN IN IMITATION OR SEMBLANCE OF BUTTER.

While this case comes before this Court on the question of the sustaining of a demurrer by the district court, (U. S. v. Carolene, 7, Fed. Sup. 500), the reports of Congressional Committees, quoted in that opinion and in Appendix A of appellant's brief present an array of purported facts all very prejudicial to appellant.

This case coming before this Court in this way, ap-

pellant has no opportunity to dispute or disprove these statements, and under the provisions of the statute would have no opportunity at a trial of the indictment to present facts or evidence that a product such as appellee is charged with shipping, is not in fact an adulterated article of food, that it is not injurious to health, and that its sale is not a fraud on the public.

However, there are decisions of four State Supreme Courts, of which this Court may take judicial notice, wherein facts contrary to those set out in the Congressional Reports and as presented by witnesses under oath are fully set out, and to these decisions, appellee respectfully invites this Court's attention. They are:

People v. Carolene Products Co., 345 Ill. 166, 177 N. E. 698 (1931)

Carolene Products Co. v. Thomson, 276 Mich. 172, 267 N. W. 608 (1936)

Banning v. Carolene Products Co., 131 Neb. 429, 268 N. W. 313 (1936)

Carolene Products Co. v. Walter McLaughlin, 365 Ill. (15 N. E. (2d) 477) (1937)

The main question involved is as to whether the constitution gives Congress the power to prohibit the interstate transportation of filled milk as defined by the statue. The test of this power is clearly stated by this Court in Kentucky Whip and Collar Co. v. Ill C. R. Co. 299 U. S. 334, 351, 81 L. Ed. 270, 277 where this Court said:

"The pertinent point is that where the subject of commerce is one as to which the power of the

> State may constitutionally be exerted by restriction or prohibition in order to prevent harmful consequences, the Congress may, if it sees fit, put forth its power to regulate interstate commerce so as to prevent that commerce from being used to impede the carrying out of the state policy."

From this statement it would seem that if the subject is one that a State cannot constitutionally prohibit, that Congress has no power to prohibit what a state may desire. In the above cited cases these state courts had before them the records of lengthy trials and each held the product to be a healthful, wholesome, growth producing food product containing nothing deleterious or injurious to health.

This fact was stipulated in the first Illinois case in 1931. In the second Illinois case in 1936 these facts were proven, the court saying:

> "* * * * * In that case the facts were stipulated, it being agreed that neither evaporated skimmed milk nor cocoanut oil, nor the combination, was harmful or deleterious to health. It was further stipulated that the use of cocoanut oil in oleomargarine was not prohibited by the laws of this State. In the present case these facts were put in issue by the pleadings. The evidence tended, however, to prove the facts which were stipulated in the earlier case. * * *
>
> "The factual situation requires consideration. The plaintiff is a domestic corporation engaged in selling throughout this State two products, called Carolene and Milnut, manufactured by the Litchfield Creamery Company at Litchfield, Illinois. Differing only in name, they are composed of

evaporated skimmed milk to which is added cocoanut oil, the latter being a fat other than milk fat. The cocoanut oil added to the skim milk to replace the extracted butter fact is much less expensive than butter fat. The plaintiff's products can be, and are sold cheaper than regular evaporated milk or condensed milk. Carolene and Milnut have the same consistency, color, taste and odor as regular evaporated milk, and are packed in air-tight cans of the same shape and size as those used by the manufacturers of regular evaporated milk. The principal, if not the only difference between evaporated milk and plaintiff's products is that in the latter the fat content is the fat of cocoanut oil instead of butter fat. The labels on the cans plainly state that the particular product is 'a compound of refined nut oils and evaporated skimmed milk,' giving the proportions of each, and that it is 'not to be sold for evaporated milk.' * * *

"From the evidence it appears that cocoanut oil is a widely used food product, it being the principal ingredient of oleomargarine; that it is used in the manufacture of oleomargarine in much larger relative amounts than in Carolene and Milnut without violating any law of this State; that its digestibility is the same as butter fat; that it is one of the finest vegetable oils on the market, and that it is a wholesome food product. Scientific tests consisting of nutrition experiments showed that Carolene and Milnut, consisting of evaporated skimmed milk and cocoanut oil, were healthful, wholesome foods and that nothing unhealthful or deleterious was contained in them. Similar tests conducted with a typical evaporated milk produced the same results."

The court further said:

"It may be conceded the legislature has no authority to forbid the sale of a known healthy food."

The Michigan Supreme Court said:

"Testimony was taken. It is undisputed that the label correctly states the ingredients of the product; that both skim milk and cocoanut oil have substantial food value; that the product contains the full food values of both; and has no properties harmful to health.

"Because the statute does not differentiate between harmful and harmless foreign oils or fats, it is not an adulteration act.

"The power of the legislature to regulate the production and sale of milk and its derivatives cannot be doubted. But the police power of regulation does not include the absolute prohibition of trade in useful and harmless articles of commerce. Being prohibitory, the act msut be declared invalid.

"The principles involved are well settled and do not need extensive citation of authorities. The constitution guarantees to citizens the general right to engage in any business which does not harm the public. **People v. Berrien Circuit Judge, 124 Mich. 664.** The constitutional right to engage in business is subject to the sovereign police power of the State to preserve public health, safety, morals or general welfare and prevent fraud. In the exercise of the police power there must be not only a public welfare to be conserved or

> public wrong to be corrected, but there must also be a reasonable relation between the remedy adopted and the public purpose."

The Nebraska Supreme Court said:

> "We conclude therefore that Carolene is a nutritious and healthful food and in no way deleterious to health in its ordinary use. Under these facts, the legislature has exceeded constitutional limits in passing this act."

In order that this Court may realize the impressions of a trial judge before whom evidence was presented there is attached hereto as Appendix, a copy of the decision of Justice Stone of the Circuit Court of Sangamon County, Illinois in the case of Carolene Products Company v. McLaughlin (unreported) and this Court's attention is invited to his statements of facts.

From the facts as shown in these decisions, as well as those which this Court judicially know, there is no question but that a compound of milk products and harmless fats, other than milk fats, is a harmless article of food, wholesome, and nutritious, and further that the fact that the compounding resulted in or remained a product resembling some milk product, has no relation to the healthfulness of the product.

The controlling question then is whether it is within the authority of Congress in regulating commerce among the states, to prohibit the transportation in interstate commerce of all mixtures or compounds of any milk product and any fats or oils other than milk fat, solely because the resulting product may be in imitation or sem-

blance of milk. The power to regulate commerce given by the Constitution to Congress is the power to regulate, that is, to prescribe the rule by which commerce is to be governed.

The parts of the statute which is copied in full, Appellant's brief p 2, 3, 4, which Appellant considers pertinent to this appeal provide:

> "It shall be unlawful for any person * * * to ship or deliver for shipment in interstate or foreign commerce any filled milk."

Filled milk is defined as:

> "Any milk, cream, or skimmed milk—to which has been added or which has been blended or compounded with, any fat or oil other than milk fat, so that the resulting product is in imitation or semblance of milk, cream, or skimmed milk, whether or not condensed, evaporated, concentrated, powdered, dried or desiccated," (Emphasis supplied)

It is declared then:

> "Filled milk as herein defined, is an adulterated article of food, injurious to the public health, and its sale constitutes a fraud upon the public."

The rule that under the power given by the Constitution to regulate interstate commerce, there is no authority given to prohibit the shipment of harmless articles is plainly set out in the case of **Hammer v. Dagenhart**, 247 U. S. 251, at page 269, 62 L. Ed. 1101, 38 S. Ct. 529. This court there says:

"In Gibbons v. Ogden, 9 Wheat. 1, Chief Justice Marshall, speaking for this court, and defining the extent and nature of the commerce power, said, 'It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed.' In other words, the power is one to control the means by which commerce is carried on, which is directly the contrary of the assumed right to forbid commerce from moving and thus destroy it as to particular commodities. But it is insisted that adjudged cases in this Court establish the doctrine that the power to regulate given to Congress incidentally includes the authority to prohibit the movement of ordinary commodities and therefore that the subject is not open for discussion. The cases demonstrate the contrary. They rest upon the character of the particular subjects dealt with and the fact that the scope of governmental authority, state or national, possessed over them is such that the authority to prohibit is as to them but the exertion of the power to regulate.

* * * *

(271) "'The power conferred is to regulate, and the very terms of the grant would seem to repel the contention that only prohibition of movement in interstate commerce was embraced. And the cogency of this is manifest since if the doctrine were applied to those manifold and important subjects of interstate commerce as to which Congress from the beginning has regulated, not prohibited, the existence of government under the Constitution would be no longer possible.'

* * *

"In each of these instances the use of interstate transportation was necessary to the accomplishment of harmful results. In other words, al-

> though the power over interstate transportation was to regulate, that could only be accomplished by prohibiting the use of the facilities of interstate commerce to effect the evil intended. * * *"

The Court below based its reasoning upon this case and the Child Labor Tax. Case, **Bailey v. Drexel Furniture Co.** 259 U. S. 20; 42 Sup. Ct. Rep. 449, 66 L. Ed. 817. Judge Fitzhenry's decision is so complete and well reasoned that it constitutes a brief in itself.

The power of Congress under the authority given by the Constitution to regulate interstate commerce, has been used in this case to arbitrarily invade the rights of the Appellee in the conduct of its business. This business is lawful in the state where the product is manufactured and from which it was shipped and is protected by injunction in the state into which it was shipped. This point is well illustrated in the case of **Adair vs. United States** 208 U. S. 161, 180, 52 L. Ed. 436, 28 S. Ct. 277 where it is said:

> "It results, on the whole case, that the provision of the statute under which the defendant was convicted must be held to be repugnant to the 5th Amendment, and as not embraced by nor within the power of Congress to regulate interstate commerce, but, under the guise of regulating interstate commerce, and as applied to this case, it arbitrarily sanctions an illegal invasion of the personal liberty as well as the right of property of the defendant Adair."

The next question is as to the character of the product the transportation of which is prohibited. Interstate

commerce may be closed when its use is necessary to the accomplishment of harmful results.

No harm can result from the transportation of a compound of two healthful, wholesome foods, which have been recognized as proper human foods from the earliest times and to which each year the science of the refinement of vegetable oils is adding others. This Court has for 40 years recognized such compounds in the form of oleomargarine, to be healthful foods. The product involved here is a compound of skimmed milk and vegetable fats other than butter fat, to wit, cocoanut oil. Milk, cream, or skimmed milk in various forms are recognized as proper foods. Cocoanut oil is one of the most widely used vegetable oil foods. Mixtures or compounds of these two are proper and legal and permitted by the Federal Food and Drugs Act of June 30, 1906. The compounds whose shipment is prohibited are harmless. The ingredients may be shipped separately, and compounds of them are freely shipped in the form of oleomargarine, salad dressings and so forth, the shipment of a mixture of them under this law being prohibited only when the resulting product is in imitation or semblance of milk, cream, or skimmed milk, or derivatives thereof. It would seem then that the statute is designed to close interstate transportation to mixtures of milk products and oils and fats only when the compounding results in a mixture which imitates or resembles milk products. If the mixtures do not resemble milk products they may be shipped. The question naturally arises as to what power Congress has to prohibit the manufacture, by prohibiting the shipment of any compound which by nature resembles milk. There is no unnatural or conscious imitation or adulteration, as

the addition of a more wholesome fat to skimmed milk increases rather than lowers its food values. There is no provision respecting coloration, and to make a compound which would not resemble milk, when 94 per cent of a milk product is combined with 6 per cent colorless oil, would require the use of some foreign substance to cause the mixture not to resemble milk in color. This cannot be compelled. In **Collins v. New Hampshire**, 171 U. S. 31, 33, 18 Sup. Ct. Rep. 768, 43 L. Ed. 60, this Court decided that a statute could not be upheld which required oleomargarine to be colored pink to distinguish it from butter. It was said:

> "The statute is in its practical effect prohibitory. It is clear that it is not an inspection law in any sense. It provides for no inspection, and it is apparent that none was intended."

The Filled milk law does not prohibit artificial coloration as do the laws of many states with respect to oleomargarine but it prohibits the shipment in its natural state, which would indicate that if something were done to the product so that it would not resemble a milk product, its shipment would be legal. This is practically the same thing attempted in the Collins case. There, oleomargarine was prohibited unless colored pink. Here Filled Milk is prohibited if it resembles milk; in other words if something were done to it, colored pink, for instance so that it would not resemble milk products in color, or if some foreign substance were incorporated in it so that it would not taste or smell like a milk product, then it could be shipped. The product is sold in its natural state. The statute requires an adulteration as the condition of its shipment. This court in the Collins case

has said this may not be required. Can a product which is skimmed milk concentrated so that all its food values, which are all of the food values of whole milk except the fat, are increased several times, be either required to be made unlike skimmed milk or its transportation in interstate commerce prohibited?

The statute is not an inspection law, a license law, a law establishing a standard of certain ingredients for food, nor since it prohibits the addition to, rather than the subtraction from, it cannot be considered an adulteration law. **Carolene v. Thomson**, 276 Mich. 172, 267 N. W. 608. Neither is it a regulatory law and does not distinguish between the addition of harmless and harmful oils or fats, hence as it shows on its face is just prohibitive.

Just what the limitations upon Congress are and what Congress may not do under the Constitution have not been as often or as clearly set out as have those things which Congress may constitutionally do and which have been held not to be constitutionally limited. Those things to which the limitations of the Constitution do not apply as held by the decisions of this Court are:

1. Diseased livestock, Reid v. Colo. 187 U. S. 137; 47 L. Ed. 108.

2. Lottery tickets, Chapmion v. Ames, 188 U. S. 321; 47 L. Ed. 492.

3. Property owned by interstate carrier, U. S. v. Del. and H. Co. 213 U. S. 266; 53 L. Ed. 836.

4. Adulterated and misbranded foods and drugs,

Hippolete Egg Co. v. U. S., 220 U. S. 45; 55 Law Ed. 364, 31 Sup. Ct. 364.

5. Women for immoral purposes. Hoke v. U. S. 227 U. S. 308; 57 L. Ed. 523; 33 S. Ct. 281.

6. Intoxicating liquors, Clark Dist. Co. v. W. Maryland Ry. Co. 242 U. S. 311; 61 L. Ed. 326, 37 S. Ct. 180.

7. Diseased plants. Ore.-Wash. R. and N. Co. v. Wash. 270 U. S. 87; 70 L. Ed. 482; 46 S. Ct. 279.

8. Stolen Motor Vehicles. Brooks v. U. S. 267 U. S. 439; 69 L. Ed. 699; 45 S. Ct. 345.

9. Kidnapped persons. Gooch v. U. S. 297 U. S. 124; 80 L. Ed. 522; 56 S. Ct. 395.

Those things to which the limitations of the constitution do apply have never been so clearly set out and collected or so often considered. Most of them relate to what a State Legislature may not do, in the exercise of its police and taxing powers. This court has said that in the exercise of its control over interstate commerce the means employed by Congress may have the quality of police regulations, and cover the use of commerce as an agency to promote immorality, dishonesty, or the spread of evil or harm, thus exercising the police power for the benefit of the public within the field of interstate commerce. We believe, then, that the limitations of state police powers to the protection of the health, morals, safety, comfort or general welfare of the people, also applies to such police powers as and when they may be exercised by Congress. The State certainly may prohibit

within its borders the possession of diseased livestock or plants, lottery tickets, the adulteration of foods and drugs, prostitution, intoxicating liquors, theft of property and kidnapping. Congress should not and cannot prevent the transportation of harmless articles the manufacture and sale of which is not subject to the police powers of the state, manufactured in compliance with the laws of the state of manufacture, and whose sale is not prohibited by the laws of the state into which they are transported.

This principle was recognized by the Webb-Kenyon Act of March 1, 1913, the Hawes-Cooper Act of January 19, 1929, and others. These laws, however, did not positively and entirely prohibit the transportation of the article but were true regulations, and further the regulations had some relation to a proper object to be attained.

The constitutional grant to congress is to regulate interstate commerce. This does not give congress authority to control the states in their exercise of the police power over local trade and manufacture. Child Labor Case, (cited above.)

"Beneficent aims, however great or well directed can never serve in lieu of constitutional powers." **Carter v. Carter Coal,** 298 U. S. 238, 291, 80 L. Ed. 1160, 1178; 56 Sup. Ct. Rep. 855.

The general government possesses no inherent power in respect to the internal affairs of the state. Id.

> "The thing to be regulated is the commerce described. In exercising the authority conferred by this clause of the constitution, Congress is powerless to regulate anything which is not com-

merce, as it is powerless to do anything about commerce which is not regulation." id. p. 297, 80 L. Ed. 1182.

This court in **U. S. v. Butler,** 297 U. S. 1, 68; 80 L. Ed. 477, 489; 56 S. Ct. 312 said:

> "The act invades the reserved rights of the states. It is a statutory plan to regulate and control agricultural production, a matter beyond the powers delegated to the Federal Government. The tax, the appropriation of the funds raised, and the direction for their disbursement, are but parts of the plan. They are but means to an unconstitutional end."

Speaking of the powers of Congress the Court said:

> "None to regulate agricultural production is given, and therefore legislation by congress for that purpose is forbidden." * * * "It is an established principle that the attainment of a prohibited end may not be accomplished under the pretext of the exertion of powers which are granted."

Agricultural production may not be regulated under the guise of the taxing power.

Rickert Rice Mills v. Fontenot, 297 U. S. 110; 80 L. Ed. 513; 56 Sup. Ct. Rep. 375 **U. S. v. Butler,** 297 U. S. 1 (Supra.)

Regulation of the employment of Child Labor in the States may not be accomplished under the guise of a tax.

Child Labor Tax Case, 259 U. S. 20, 42 S. Ct. 449.

Congress may not regulate the hours of labor of

children in the states by a prohibition against the movement in interstate commerce of ordinary commercial commodities.

Hammer v. Dagenhart, 247 U. S. 251, 62 L. Ed. 1101, 38 S. Ct. 529.

Congress is without power to regulate the production of milk.

U. S. Seven Oaks Dairy Co. 10 Fed. Sup 995; **Columbus Milk Producers Co-op. Assn. v. Wallace,** 8 Fed. Sup. 1014;

Congress has no power to regulate wages and hours of labor in a local business.

Schechter Poultry Co. v. U. S. 295 U. S. 495, 79 L. Ed. 1570.

Power to regulate commerce embraces the power to protect that commerce from injury. How is commerce injured by shipping a product defined as a mixture of milk products with oils foreign to milk, which resembles a milk product? To give Congress or a State power to prohibit such a product it must be such a product as will injuriously affect the health, morals, comfort or safety of the public. No such charge can truthfully be brought against this product.

The statute declares that it is an adulterated article. It is not adulterated under the general law of the United States or any State. The statute declares it is injurious to health. Common sense knows it is not injurious to health and that Congress permits its shipment in other forms, not resembling milk. The statute declares its sale

constitutes a fraud on the public. Fraud is never presumed and Congress has no authority or jurisdiction to prohibit or punish fraud except against the Government and the statute therefore usurps the power of the state under the cloak of its authority to regulate interstate commerce. In **Plumley v. Massachusetts**, 155 U. S. 461, 472, 15 S. Ct. 154, 39 L. Ed. 222 this court said:

> "If there be any subject over which it would seem the states ought to have plenary control and the power to legislate in respect to which it ought not be supposed was intended to be surrendered to the general government it is the protection of the people against fraud and deception in the sale of food products. * * *"

In **Raher's case**, 140 U. S. 545, 554; 35 L. Ed. 572; 11 Sup. Ct. 865 the court said:

> "The power of the state to impose restraints and burdens upon persons and property in conservation and promotion of the public health, good order and prosperity, is a power originally and always belonging to the states, not surrendered by them to the general government, nor directly restrained by the constitution of the United States, and essentially exclusive," and that, (555) "it is not to be doubted that the power to make the ordinary regulations of police remains with the individual States, and cannot be assumed by the National Government."
>
> "Health laws of every description" form a portion of that mass of legislation not surrendered to the general government.
>
> **Gibbons v. Ogden**, Wheat. 1, 203, 6 Sup. Ct. Rep. 1, 6 L. Ed. 23.

Barbier v. Connolly, 113 U. S. 27, 31; 5 Sup. Ct. Rep. 357, 28 L. Ed. 923.

Carter v. Carter Coal Co. 298 U. S. 238, 290; 36 Sup. Ct. Rep. 855, 80 L. Ed. 1160.

In the License Cases, 5 Howard 504, 581, 12 L. Ed. 256, 291, this Court said:

"So also, in regard to health and quarantine laws. They have been continually passed by the states ever since the adoption of the constitution, and the power to pass them recognized by acts of Congress.* * * and constantly affirmed and supported by this Court whenever the subject came before it."

If the Congress has the same police power as the states, which is not admitted, then its acts under that power are subject to the same limitations. The four State Supreme Courts cited above have recently held that the manufacture, sale, or possession for sale of Filled Milk as defined by the Act of March 4, 1923, could not be prohibited under the police power of the State, such a statute having no relation to the protection of the health, morals, safety or welfare of the public.

The Supreme Court of Illinois in 1931, in People v. Carolene 345 Ill. 166 177 N. E. 698 said:

"This court has by many decisions upheld the right of the citizen to engage in any occupation not detrimental to the public health, safety and welfare, free from regulation by the exercise of the police power. (Banghart v. Walsh, 309 Ill. 132; Bessette v. People, 193 id. 334; Ruhstrat v.

People, 185 id. 133.) The measures adopted by the legislature to protect the public health and secure the public safety and welfare must have some relation to these proposed ends. (Ritchie v. People, 155 Ill. 98). Rights of property will not be permitted to be invaded under the guise of police regulation. (Bailey v. People, 190 Ill. 28). If it is manifest that the statute or ordinance, under the guise of a police regulation, does not tend to preserve the public health, safety or welfare, it is void as an invasion of the property rights of the individual. People v. Weiner, 271 Ill. 74; Ramsey v. People, 142 id. 380."

The Supreme Court of Michigan in 1936, in **Carolene v. Thompson**, 276 Michigan 172, 267 N. W. 608 said:

"Prohibition of manufacture and sale of a nutritious food product which is harmless to public health cannot be justified under the police power to preserve public health, because the remedy has no reasonable relation to the purpose unless, at least, it appears that other similar products, dangerous to health, are on the market and that prohibition of all is reasonably necessary to protect the public health because of the impracticability of separating the good from the bad. There is no such claim here."

The Supreme court of Nebraska in 1936 in **Banning v. Carolene** 131 Nebraska, 429, 268 N. W. 313 said:

"A citizen clearly has the right to engage in any occupation not detrimental to the public health, safety and welfare. Measures adopted by the legislature to protect the public health and secure the public safety and welfare must have some relation to those proposed ends. If it is apparent

that the statute, under the guise of a police regulation, does not tend to preserve the public health, safety or welfare, it is unconstitutional as an invasion of the property rights of the individual."

The Supreme Court of Illinois in 1936 (the personnel of the court being different from that in 1931, with the exception of one Justice) in **Carolene Products Company, Appellee v. McLaughlin** 365 Ill. 62; 5 N. E. (2) 447 said:

"The question remains whether **Section 2** of the present statute brings the Filled Milk act of 1935 within the scope of the legitimate exercise of the police power. The applicable principles are well settled. The challenged statute constitutes a valid exertion of the police power of the State, if its provisions bear a real and substantial relation to the public health or the protection of the public against fraud. Legislatures may not, however, under the guise of the police power, impose unnecessary and unreasonable restrictions upon the use of private property or the pursuit of useful activities and lawful occupations. (Weaver v. Palmer Bros. Co., 270 U. S. 402; Burns Baking Co. v. Bryan, 264 id. 504; Koos v. Saunders, 349 Ill 442; Frazer v. Shelton, 320 id. 253.) The legislative determination of whether a statute is a proper exercise of the police power is not necessarily conclusive. Whether the means employed have any real, substantial relation to the public health, comfort, safety or welfare, or are essentially arbitrary and unreasonable, is a question which is subject to review by the courts. People v. Belcastro, 356 Ill. 144; Banghart v. Walsh, 339 id. 132; People v. Robertson, 302 id. 442; People v. Steele, 231 id. 340."

The decisions of this court are to the same effect. The rule as set out in **Mugler v. Kansas**, 123 U. S. 623, 661, 31 L. Ed. 205, 210; 8 Sup. Ct. 273 has been accepted. That rule is:

> "* * * * * If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution."

Liggett v. Baldridge 278 U. S. 105; 73 L. Ed. 204.
Lochner v. N. Y. 198 U. S. 45, 62; 49 L. Ed. 937, 944.

This Court in **Nebbia v. N. Y.** 291 U. S. 502, 525; 78 L. Ed. 940 said:

> "And the guarantee of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained."

In **Burns Baking Co. v. Bryan** 264 U. S. 504, 513; 44 S. Ct. 412 (Syl. 2) it was said:

> "It is the duty of the Court to determine whether a regulation challenged under the Constitution has a reasonable relation to, and a real tendency to accomplish the purpose for which it was enacted."

There is no reasonable basis for the conclusion that the act is a health measure. This is shown by the fact

that the law prohibits the addition of any fat or oil other than butter fat to whole milk and cream which contain vitamin A as well as to skimmed milk which contains little vitamin A.

The appellant bases its support of the proposition that filled milk is harmful to public health on the sole proposition that if it be a mixture of skimmed milk and vegetable oils or fats it contains little vitamin A. This contention was well met by the Michigan Supreme Court as follows:

> "The State contends that plaintiff's product is harmful to public health, not in that it has deleterious properties, but because it does not contain vitamin A, an element of whole milk and cream, which inheres in the cream in the process of skimming, which is wholly or substantially absent from skimmed milk, is not found in cocoanut oil, and is an essential of health. Vitamin A is also lacking in other common articles of food. Hence the need for a balanced diet.
>
> "The argument of the State might have force were the statute confined to skimmed milk. But that the act has no concern with the lack of vitamin A is conclusively demonstrated by the fact that (1) it merely prohibits addition to, not subtraction from, milk and its derivatives; (2), the prohibition applies alike to whole milk and cream, which contains vitamin A as to skim milk, which lacks it; and (3) the legislature would be guilty of gross inconsistency in permitting, in other acts, production and sale of skim milk although it does not contain vitamin A, and, in this act, prohibiting sale of skim milk, because it does not contain vitamin A, the addition of the foreign

> oils and fats having no effect upon the presence of such vitamins."

It would have just as little or just as much vitamin A if it were artificially colored red or blue and made to taste differently as it does in its natural state, yet in that case it would not resemble milk and would not be included in the act.

Milk which consists of proteins, carbohydrates, fats and minerals has one distinguished feature. The fats may be separated and by agitation solidified into butter which in its distinct form is one of the leading food products in the United States. This leaves the other food properties constituting over 2-3 of the food values of milk unchanged. This part of the original product is known and is defined as "skimmed milk." Its sale is permitted and regulated and its greater use urged by leading food authorities and even by the United States Department of Agriculture. Sherman, **Science of Nutrition,** p. 193 and **Year Book of Agriculture,** 1935, p. 172. Extensive experiments conducted by Professor Langworthy of the United States Department of Agriculture showed that coconut oil is equally digestible with butter fat; **U. S. Department of Agriculture Bulletin Number 505.**

In **Commissioner v. Hufnal,** 185 Pa. 376, 380, 39 A 1052 the court said:

> "We are constrained to hold therefore that skimmed milk is not adulterated milk even within the very broad and peculiar meaning of the word adulterated in the Act of 1895. Undoubtedly if sold as whole milk or even as milk without any descriptive epithet, it would be within the statute

> as milk from which a valuable constituent had been abstracted. But, even though it has lost its most valuable ingredient, skimmed milk is still a useful and important article of consumption and its sale has never been prohibited. When sold candidly under its own name there is nothing legally or morally wrong in the transaction, and, 'skimmed milk' we understand to be the generic term by which is meant milk from which its natural cream has been taken in part or in whole."

The Pennsylvania Milk Control Board has established a minimum price for skimmed milk of 8 or 9 cents per quart.

Its use in combination with other fats however, has been persistently opposed by the powerful dairy interests where such compounds have come in competition with butter or milk products. These interests from 1880 to date have secured the passage of restrictive or prohibitory laws with respect to the use of such compounds in competition with butter and from 1920 to date, when the compounds came in competition with milk. Thus, the statute here in question, and similar prohibitory laws in 21 states were enacted. With one exception when the constitutionality of these prohibitive laws have been passed upon by the highest state courts, they have been held void. That one case was **State v. Emery** 178 Wis. 147, 1897 N. W. 564 in 1922. That court, however, reversed every holding in **Jelke v. Emery,** 193 Wis. 311, 214 N. W. 369 in 1927.

There is no more reason to absolutely prohibit the shipment in interstate commerce of filled milk as defined in the statute than there was to prohibit the use of shoddy

in the manufacture of bedding in the recent case of **Weaver v. Palmer Bros. Co.**, 270 U. S. 402, 410; L. Ed. 654, 656, 46 Sup. Ct. Rep. 320 where this Court said:

> "The question for decision is whether the provision purporting absolutely to forbid the use of shoddy in comfortables violates the due process clause or the equal protection clause.
>
> • • •
>
> (412) "There was no evidence that any sickness or disease was ever caused by the use of shoddy.
>
> • • •
>
> "Shoddy filled comfortables made by appellee are useful articles for which there is much demand. And it is a matter of public concern that the production and sale of things necessary or convenient for use should not be forbidden.

After describing the provisions of the statute for inspection tagging and labeling the court further said: (P. 415)

> "Obviously these regulations or others that are adequate may be effectively applied to shoddy-filled articles. • • •
>
> "The business here involved is legitimate and useful and while it is subject to reasonable regulations the absolute prohibition of the use of shoddy in the manufacture of comfortables is purely arbitrary and violates the due process clause of the 14th amendment."

Citing:

Adams v. Tanner 244 U. S. 590, 596, 61 L. Ed. 1336, 1343; 37 S. Ct. 662.

Meyer v. Nebraska 262 U. S. 390, 67 L. Ed. 1042; 43 S. Ct. 625.

Jay Burns Packing Company v. Bryan, 264 U. S. 504, 68 L. Ed. 813; 44 S. Ct. 412.

Imitation and semblance of a product like filled milk which to be successfully or extensively sold must be packed in hermetically sealed cans, depends entirely on the labels on the containers since the product itself cannot be seen, smelled or tasted until the container is opened, and the purchase is first made because the label for some reason attracts the notice of the customer. If the provisions of the Food and Drugs Act are not adequate, further regulation of labels might be required as is done by statute in several states. For example, Michigan requires that the package be labelled "Filled Milk" in prescribed size letters, and cards displayed where sold or used.

Certainly the product is useful and in demand, and if needed, subject to reasonable regulation, but is no more subject to absolute prohibition than was the shoddy-filled beddings.

This Court as well as all lower Federal Courts have never departed from the principal that prohibition will not be permitted where regulation will accomplish the ends desired. In the very recent case of **Lone Star Gas Co. v. City of Fort Worth**, 93 Fed. (2) 584, the Circuit Court of Appeals of the 5th Circuit enjoined the enforcement of an ordinance prohibiting the addition of air to fuel gas as being unreasonable and arbitrary and denying due process. The court said:

"We are of opinion that the evidence here sustains the burden, and shows an interference with an established business and plant by prohibition when regulation would answer, so unreasonable as to be contrary to the charter power, and a taking of property without due process of law. That .. police power must be exercised reasonably and within the limits of public necessity when individuals will be injuriously affected is well established. Weaver v. Palmer Bros. Co., 270 U. S. 402, 46 S. Ct. 320, 70 L. Ed. 654; Adams v. Tanner, 244 U. S. 590; People's Petroleum Producers v. Sterling, D. C., 60 F. 2d 1041; Hulen v. City of Corsicana, 5 Cir., 65 F. 2d 969; People v. Weiner, 271 Ill. 74, 110 N. E. 870, L. R. A. 1916C, Ann. Cas. 1917C, 1065. The enforcement of section 1 ought to be enjoined, without prejudice to the enactment of such reasonable regulations touching the addition of air or nitrogen as the city may find necessary. The remainder of the ordinance stands."

No regulation has been attempted in this statute. The regulatory features of the Food and Drugs Act are not violated.

Under the fourteenth amendment, nothing is more clearly settled than that it is beyond the power of the state under the guise of protecting the public, arbitrarily to interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them. **New State Ice Co. v. Leibmann**, 285 U. S. 262, 278, 76 L. Ed. 747, 754; 52 Sup. Ct. Rep. 371. This decision cites, **Jay Burns Baking Co. v. Bryan** 264 U. S. 504, 513; 68 L. Ed. 813, 826 where a law fixing weight of loaves of broad was held unreasonable and arbitrary and having no relation to preventing short weights. The

words of the Court are very apt in this case where it said (P. 279):

> "The control here asserted does not protect against monopoly, but tends to foster it. The aim is not to encourage competition, but to prevent it; not to regulate the business, but to preclude persons from engaging in it. There is no difference in principle between this case and the attempt of the dairyman under state authority to prevent another from keeping cows and selling milk on the ground that there are enough dairymen in the business; or to prevent a shoemaker from making or selling shoes because shoemakers already in that occupation can make and sell all of the shoes that are needed."

In the Child Labor case the statute said that you may not ship the product if it is made by the labor of children; in this case the court says—you may not ship a mixture or compound if it be in imitation or semblance of milk, etc. The necessary effect of the law is to prohibit the creation or manufacture of any food out of any milk product which resembles milk, cream, or skimmed milk in any form.

This case involves principles very similar to those before this court in **Adams v. Tanner**, 244 U. S. 590, where a Washington statute prohibited employment agencies. This Court there said (593):

> "But we think it plain that there is nothing inherently immoral or dangerous to public welfare in acting as paid representative of another to find a position in which he can earn an honest living. On the contrary, such service is useful, com-

> mendable and in great demand. * * * (594) Because abuses may, and probably do, grow up in connection with this business, is adequate reason for hedging it about by proper regulations, But this is not enough to justify destruction of one's right to follow a distinctly useful calling in an upright way. Certainly there is no profession, possibly no business, which does not offer peculiar opportunities for reprehensive practices: and as to every one of them, no doubt, some can be found quite ready earnestly to maintain that its suppression would be in the public interest. Skillfully directed agitation might also bring about apparent condemnation of any one of them by the public. Happily for all, the fundamental guaranties of the Constitution cannot be freely submerged if and whenever some ostensible justification is advanced and the police power invoked."

Skillfully directed agitation from 1921 to 1923 brought about the passage of this law and similar ones in a great many states. The great majority of decisions of this court deciding whether certain legislation deprives the citizen if due process relate to state statutes. However with respect to the exercise of the police power it cannot be said that Congress has more leeway or may do things in the exercise of its police power than can be constitutionally done by the State. In the exercise of its constitutional power to regulate commerce Congress has enacted the Food and Drugs Act of June 30, 1906. The primary purpose was to prevent injury to the public health by the sale and transportation in interstate commerce of misbranded and adulterated foods, securing the purity of foods and to inform purchasers of what they are buying. This statute prohibits the interstate com-

merce in articles of food or drugs which are adulterated or misbranded and then proceeds to carefully define those terms, and point out what constitutes adulteration and misbranding. It was intended to protect the public health from possible injury by adding to food, poisonous and deleterious substances, and to protect from injurious deceits. **U. S. v. Lexington Mills** 232 U. S. 399, 58 L. Ed. 658; 34 Sup. Ct. 337. In the Food & Drugs Act a special provision was made with respect to mixtures or compounds. Chapter 1, Sec. 10 provides:

> "An article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded in the following cases;
>
> "Mixtures or compounds under distinctive names. —First. In the case of mixtures or compounds which may be now or from time to time hereafter known as articles of food, under their own distinctive names, and not an imitation of or offered for sale under the distinctive name of another article, if the name be accompanied on the same label or brand with a statement of the place where said article has been manufactured or produced.
>
> "Second. In the case of articles labeled, branded, or tagged so as to plainly indicate that they are compounds, imitations, or blends, and the word 'compound,' 'imitation,' or 'blend,' as the case may be, is plainly stated on the package in which it is offered for sale. The term blend as used herein shall be construed to mean a mixture of like substances, not excluding harmless coloring and flavoring ingredients used for the purpose of coloring and flavoring only. * * *".

This Court in **McDermott v. Wis.** 228 U. S. 115, 129 said:

> "The article of food or drugs, the shipment or delivery for shipment in interstate commerce of which is prohibited and punished is such as is **adulterated or misbranded within** the meaning of the act. What it is to adulterate or misbrand food or drugs within the meaning of the act requires a consideration of its other provisions, wherein such adulteration or misbranding is defined."
>
> (Emphasis ours)

The filled milk statute by its terms relates to compounds of fats and milk products. It is a compound which is neither adulterated nor misbranded under the main provisions of the Food and Drugs Act. It takes out of the general law as to mixtures and compounds, all mixtures or compounds of fats, other than milk fats, and any form of milk—if, the resulting product is in imitation or semblance of any form of milk. It prohibits its shipment. There has been nothing done to cause an imitation.

In **Baltimore Butterine Co. v. Talmadge,** 32 Fed. (2) 904, 909 the court said:

> "Is it not true that 'imitation' indicates something intentional rather than incidental? It imports more than mere resemblance or similitude. If such be true, can any one conceive that the manufacturer of this product was intending to produce an imitation when it was so named and described as to make that impossible."

The comment of Judge Barrett in the above case

with respect to butter applies very forcibly with respect to the apparent intention of Congress in the Filled Milk Law to make unlawful any substitute for milk. He said:

> "Furthermore there is no requirement of the law that a person must use either creamery butter or go without any substitute therefor, provided the substitute was not sold so misbranded as to deceive or so adulterated as to injure. The purpose of this law, it must be remembered, is not to protect other industries, even though they be so important as the dairy industry, but is to protect the consumer from deception or injury. If this be not the correct view, the state is committed to the use of creamery butter for all time for all the purposes now used, and cannot use any substitute therefor derived from other sources, even though more economical, more palatable and more popular."

> "Fraud is never presumed, but must be established by evidence. Of the correctness of his proposition, or its application to the case, there should be no question * * * Fraud is not to be lightly imputed. While certain circumstances will give an inference of fraud, yet the law never presumes it."

Jones v. Simpson, 116 U. S. 609, 615; 29 L. Ed. 742; 6 Sup. Ct. 538
Griffiths v. Commissioner, 50 Fed. (2) 782
Wharton v. Aetna Life Ins. Co., 48 Fed. (2) 37
Tucker v. Traylor Eng. & Mfg. Co., 48 Fed. (2) 783
Superior Oil Corp. v. Mallock, 47 Fed. (2) 993
Pac. Mutual Life Ins. Co. v. Cunningham, 54 Fed. (2) 927
Pardee v. Houcott, 32 Fed. (2) 81, 86

Maryland Casualty Co. v. Palmetto, 40 Fed. (2) 374; Cert. denied 280 U. S. 581
Baer v. Sec. Tr. Co., 32 Fed. (2) 147, 149; Cert. denied 280 U. S. 588
National Bank v. U. S., 34 Fed. (2) 203

In the history of Congressional legislation there is but one instance known to counsel where there has been an attempt to accomplish what has been done by the Filled Milk Law. That is the Oleomargarine legislation. Under the taxing power Congress has levied a tax which was so exorbitant that it was intended to prohibit all products made in imitation or semblance of butter. However, it did not prohibit, but because it was construed to regulate, it has been upheld. It provided strict regulation as to branding, packages, books and records to be kept, labels, marks, and licenses for manufacture, wholesaling and retailing in addition to stamps on the product itself. This court has upheld this law but more than once with apologies and criticisms. It regulated—but did not absolutely prohibit. Here it is a prohibition and not a regulation.

Similar and prohibitive laws were enacted by many states. In 1887 in **Powell v. Pa.**, 127 U. S. 678, 8 Sup. Ct. Rep. 992, 32 L. Ed. 253, this court upheld a statute of Pennsylvania prohibiting the product. Mr. Justice Field wrote a strong dissenting opinion, which according to the Supreme Court of Wisconsin in **Jelke v. Emery**, 193 Wis. 311, 214 N. W. 369, 372 ten years later became the law in **Schollenberger v. Pa.**, 171 U. S. 1 where this Court said:

"We deny the right of a state to absolutely prohibit the introduction within its borders of an

article of commerce, which is not adulterated and which in its pure state is healthful, simply because such an article in the course of its manufacture may be adulterated by dishonest manufacturers for the purposes of fraud or illegal gains. **The bad article may be prohibited, but not the pure and healthy one.** * * * **The fact that** it may be adulterated does not afford a foundation to absolutely prohibit its introduction into the state. Although the adulterated article may possibly in some cases be injurious to the health of the public, yet that does not furnish a justification for an absolute prohibition. **A law which** does thus prohibit the introduction of an article like oleomargarine within the state is not a law which regulates or restricts the sale of articles deemed injurious to the health of the community, but is one which prevents the introduction of a perfectly healthful commodity merely for the purpose of in that way more easily preventing an adulterated and possibly **injurious article** from being introduced. We do not think this a fair exercise of legislative descretion when applied to the article in question."

(Emphasis ours)

If a State cannot prohibit the shipment of a mixture of fats and milk in interstate commerce surely the same thing may not be done by Congress, under its power to "regulate." In **Jelke v. Emery**, 193 Wis. 311, 214 N. W. at p. 373 it is said:

"The courts now take judicial knowledge that oleomargarine is a healthy wholesome food."

Citing:

Braun & Fitts v. Coyne, 125 Fed. 331

Peo v. Arensberg, 105 N. Y. 123

State v. Hanson, 118 Minn. 85

II

THE STATUTE VIOLATES THE DUE PROCESS OF LAW PROVISIONS OF THE CONSTITUTION, IS A SPECIAL LAW, A LEGISLATIVE JUDGMENT AND DECREE AND AN ARBITRARY EXERTION OF LEGISLATIVE POWER, USURPING THE FUNCTIONS OF THE COURT AND JURY, AND CONTAINING A CONCLUSIVE PRESUMPTION AS TO ADULTERATION, INJURY TO HEALTH AND FRAUD.

The statute provides: "It is declared that filled milk, as herein defined is an adulterated article of food, injurious to the public health, and its sale constitutes a fraud upon the public."

This is a legislative judgment, condemnation, and sentence.

Due process of law implies the right of the person affected thereby to be present before the tribunal which pronounces judgment, to be heard by testimony or otherwise, and to have the right to controvert by proof any material facts which bear upon the question of right, and if any question of fact or liability is conclusively presumed against him, it is not due process of law.

Zeigler v. S. & A. A. R. Co., 59 Ala. 594
Wilbur v. McAlley, 63 Ala. 436.

No more complete exposition of the restrictions under

the due process clause can be found than that given by this court in **Hurtado v. People of California,** 110 U. S. 516; 535; 4 Sup. Ct. Rep. 111, 28 L. Ed. 232 where the court says:

> "Due process of law in the latter refers to that law of the land, which derives its authority from the legislative powers conferred upon Congress by the Constitution of the United States, exercised within the limits therein prescribed, and interpreted according to the principles of the common law. * * * But it is not to be supposed that these legislative powers are absolute and despotic, and that the Amendment prescribing due process of law is too vague and indefinite to operate as a practical restraint. It is not every act, legislative in form, that is law. Law is something more than mere will exerted as an act of power. It must be not a special rule for a particular person or a particular case, but, in the language of Mr. Webster, in his familiar definition, **'The general law, a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial,'** so 'that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society,' and thus excluding as not due process of law, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments and acts directly transfering one man's estate to another, **legislative judgments and decrees,** and other similar special partial and arbitrary exertions of power under the forms of legislation.
>
> "Arbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law, whether manifested as the decree of

a personal monarch or of an impersonal multitude. And the limitations imposed by our constitutional law upon the action of the governments, both state and national, are essential to the preservation of public and private rights, notwithstanding the representative character of our political institutions. **The enforcement of these limitations by judicial process is the device of self-governing communities to protect the rights of individuals and minorities,** as well against the power of numbers, as against the violence of public agents transcending the limits of lawful authority, even when acting in the name and wielding the force of the government."
(Emphasis ours)

This case is cited and approved in the case of **Truax v. Corrigan,** 257 U. S. 312, forbidding injunctions against ex-employees, 42 Sup. Ct. Rep. 124, 66 L. Ed. 254, where it is said:

"The due process clause brought down from Magna Charta was found in the early state constitutions and later in the Fifth Amendment to the Federal Constitution as a limitation upon the executive, legislative, and judicial powers of the Federal Government, while the equality clause does not appear in the Fifth Amendment and so does not apply to congressional legislation. **The due process clause requires that every man shall have the protection of his day in court, and the benefit of the general law,—a law which hears before it condemns,** which proceeds not arbitrarily or capriciously but upon inquiry, and renders judgment only after trial, so that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society." (Emphasis ours)

In **Hovey v. Elliott**, 167 U. S. 409, 417, 17 Sup. Ct. 841, 42 L. Ed. 215, it is said:

> "Can it be doubted that due process of law signifies a right to be heard in one's defense. If the legislative department of the government were to enact a statute conferring the right to condemn the citizen without any opportunity whatever of being heard, would it be pretended that such an enactment would not be violative of the Constitution."

In the most quoted case, **Schlesinger v. Wisconsin**, 270 U. S. 230, 239, 70 L. Ed. 557, 563, 46 Sup. Ct. 260, the law provided that every transfer by deed, grant, bargain, sale or gift, made within six years prior to the death of the grantor * * * shall be construed to have been made in contemplation of death. The court held that this conclusive presumption was a denial of equal protection of the laws in violation of the Constitution, saying:

> "The challenged enactment plainly undertakes to raise a conclusive presumption that all material gifts within six years of death were made in anticipation of it and to lay a graduated inheritance tax upon them without regard to the actual intent. The presumption is declared to be conclusive and cannot be overcome by evidence. It is no mere prima facie presumption of fact.
>
> "The court below declared that a tax on gifts inter vivos only could not be so laid as to hit those made within six years of the donor's death and exempt all others—this would be 'wholly arbitrary.' We agree with this view and are of opinion that such a classification would be in plain conflict with the 14th Amendment. The

> legislative action here challeged is no less arbitrary. Gifts inter vivos within six years of death, but in fact made without contemplation thereof, are first conclusively presumed to have been so made without regard to actualities, while like gifts at other times are not thus treated. There is no adequate basis for this distinction."

A subsequent statute reduced the time to two years and was also held unconstitutional in **Hall v. White**, 48 Fed. (2) 1060, where the court said:

> "Mere legislative fiat may not take the place of fact in the determination of issues involving life, liberty or property."

This decision was sustained by the Circuit Court of Appeals, 53 Fed. (2) 210.

In **Heiner v. Donnan**, 285 U. S. 312, 327, 76 L. Ed. 772, 52 Sup. Ct. Rep. 358, 780, a statute was under consideration which contained the presumption that all gifts made within two years of death were made in contemplation of death. The court said:

> "This is very near to saying that the individual, innocent of evasion, may be stripped of his constitutional rights in order to further a more thorough enforcement of the tax against the guilty, a new and startling doctrine, condemned by its mere statement and distinctly repudiated by this court in the **Schlesinger's Case**, 270 U. S. p. 240, 70 L. Ed. 564, and **Hoeper's Case**, 284 U. S., pp. 217, 248, cases involving similar situations. * * *
>
> (329) "However, whether the latter presumption be treated as a rule of evidence or of substantive

law, it constitutes an attempt, by legislative fiat, to enact into existence a fact which here does not, and cannot be made to exist in actuality, and the result is the same, unless we are ready to overrule the **Schlesinger Case**, as we are not; for that case dealt with a conclusive presumption and the court held it invalid without regard to the question of its technical characterization. This court has held more than once that a statute creating a presumption which operates to deny a fair opportunity to rebut it violates the due process clause of the 14th Amendment. For example, **Bailey v. Alabama**, 219 U. S. 219, 238 et seq., **Manley v. Georgia**, 279 U. S. 1, 5, 6. 'It is apparent,' this court said in the **Bailey Case** (p. 239) 'that a constitutional prohibition cannot be transgressed indirectly by the creation of a statutory presumption any more than it can be violated by direct enactment. The power to create presumptions is not a means of escape from constitutional restrictions.' "

In providing by statute that filled milk is an adulterated article, injurious to public health and a fraud upon the public, Congress has usurped the functions of the Judicial Department. In his work on Constitutional limitations, 8th Ed. page 176, Cooley says:

"The grant of the judicial power to the department created for the purpose of exercising it must be regarded as an exclusive grant covering the whole power subject only to the limitations which the constitution imposes.

(184) "Legislation cannot directly reach the property or vested rights of the citizen by providing for their forfeiture or transfer to another without trial and judgment in the courts for to do

so would be to exercise a power which belongs to another branch of the government and is forbidden to the legislative. That is not legislation which adjudicates in a particular case, prescribes the rule contrary to the general law and orders it to be enforced. Such power assimilates itself more closely to despotic rule than any other attribute of government."

The author cites:

Ervine's Appeal, 16 Pa. St. 256;

Greenough v. Greenough, 11 Pa. St. 489;

Distintellaux v. Fairchild, 15 Pa. St. 18;

Trustees v. Bailey, 10 Fla. 238.

The statute is a penal statute punishing the shipment or delivery for shipment of filled milk, but this punishment is based entirely upon certain conclusive presumptions which make the question of adulteration, healthfulness and fraud res adjudicata and deprive a defendant of his right to offer proof with respect thereto.

In **Killbourn v. Thompson,** 103 U. S. 168 at p. 182, 26 L. Ed. 377, it is said:

"No general power of inflicting punishment by the Congress of the United States is found in that instrument (the Constitution). It contains a provision that no person shall be deprived of life, liberty or property without due process of law. The strongest implication against punishment by order of the legislative body. It has been repeatedly decided by this court and by others of the highest authority that this means a trial in which

the rights of the party shall be decided by a tribunal appointed by law which tribunal is to be governed by the rules of law previously established."

The legislative department has no power under the Constitution to conclusively presume anything. The case of **Chicago, Milwaukee & St. Paul R. R. v. Minnesota,** 134 U. S. 418, involving the rights of the Railroad Commission to fix rates very clearly points this out. There the power of the commission was not simply advisory nor merely prima facie as to what rates were equal and reasonable but was final and conclusive and the law did not contemplate or allow any issue or inquiry to be made as to whether the rates were in fact equal and reasonable, leaving no facts to be traversed except the violation of the law in not complying with the recommendations of the Commission. This Court held that such a statute conflicted with the Constitution of the United States in that it deprived the Railroad Company of its right to a judicial investigation by a due process of law under the forms and with the machinery provided for the judicial investigation of the truth of a matter in controversy and substituted therefor the absolute finality of the action of the Railroad Commission.

The court said: (458)

"The question of the reasonableness of a rate of charge for transportation by a railroad company involving as it does the element of reasonableness both as regards the company and as regards the public is eminently a question for judicial investigation requiring due process of law for its determination. Neither the legislature nor such com-

mission acting under the authority of the legislature can establish arbitrarily and without regard to justice the rates for such transportation."

So in the case at hand the legislature has no authority to establish that a combination of two healthful, wholesome, widely used food products is an adulterated article, deleterious to health and a fraud upon the public.

What possible relation can the fact that when a harmless fat is combined with a milk product and the resulting product resembles any milk product have to do with adulteration, healthfulness or fraud? Yet the statute declares that such a product is an adulterated article of food, is injurious to the public, and its sale is a fraud on the public.

The indictment charges the shipment of a certain adulterated article of food, injurious to the public health, to wit Milnut, which was a product of condensed skimmed milk blended with coconut oil the resulting product being in imitation of and semblance of milk, cream, skimmed milk, etc.

A combination of skimmed milk and coconut oil is not an adulterated article under the food and drugs act of June 30, 1906.

Picture the position of defendant being put to trial on this indictment on a plea of not guilty. The government need only prove that it is a compound of skimmed milk and coconut oil as shown on the label and the shipment of the product in interstate commerce, and that it resembled milk, cream or skimmed milk, etc.

In defense defendant attempts to prove it is not adulterated under the Food and Drugs Act. The admission of such evidence is denied since the law declares it is an adulterated article of food. Defendant attempts to prove it is not injurious to health. Again the offer is rejected as the statute declares it is injurious to health. The same would be true if the charge were fraud—not, however, charged in this indictment.

The situation would be identical to the one existing in the case of **Bailey v. Alabama,** 219 U. S. 219, 55 L. Ed. 191, 31 S. Ct. 145, where the statute provided in substance that the refusal or failure to perform the service contracted for, or to refund the money obtained, without just cause, should be prima facie evidence of the intent to injure or defraud.

The court said: (236)

"The law of the state did not permit him to testify that he did not intend to injure or defraud. Unless he were fortunate enough to be able to command evidence of circumstances affirmatively showing good faith, he was helpless. **He stood, stripped by the statute of the presumption of innocence, and exposed to conviction for fraud upon evidence only of breach of contract and failure to pay.**

"It is said that we may assume that a fair jury would convict only where the circumstances sufficiently indicated a fraudulent intent. Why should this be assumed in the face of the statute and upon this record? In the present case the jury did convict, although there is an absence of evidence sufficient to establish fraud under the familiar rule that **fraud will not be presumed,**

and the obvious explanation of the verdict is that the trial court, in accordance with the statute, charged the jury that refusal to perform the service, or to repay the money, without just cause, constituted prima facie evidence of the commission of the offense which the statute defined. That is, the jury were told in effect that the evidence, under the statutory rule, was sufficient, and hence they treated it as such.

(239) "So, also, it must not under guise of regulating the presentation of evidence, operate to preclude the party from the right to present his defense to the main fact thus presumed. If a legislative provision not unreasonable in itself, prescribing a rule of evidence, in either criminal or civil cases, does not shut out from the party affected a reasonable opportunity to submit to the jury in his defense all of the facts bearing upon the issue, there is no ground for holding that due process of law has been denied him.

"But where the conduct or fact, the existence of which is made the basis of the **statutory presumption**, itself falls within the scope of a provision of the Federal Constitution, a further question arises. It is apparent that a constitutional prohibition cannot be transgressed indirectly by the creation of a **statutory presumption any more than it can be violated by direct enactment.** The power to create presumption is not a means of escape from constitutional restrictions." (Emphasis ours)

In Manley v. Georgia, 279 U. S. 1, 73 L. Ed. 575, 49 Sup. Ct. Rep. 215, the questioned statute was as follows: (p. 4)

"Every insolvency of a bank shall be deemed

fraudulent, and the president and directors shall be severally punished by imprisonment and labor in the penitentiary for not less than one year nor longer than ten years; * * *"

The court said:

"A statute creating a presumption that is arbitrary or that operates to deny a fair opportunity to repel it violates the due process clause of the 14th Amendment. Bailey v. Alabama, 219 U. S. 219, 233. Mere legislative fiat may not take the place of fact in the determination of issues involving life, liberty or property. 'It is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime.' McFarland v. American Sugar Ref. Co., 241 U. S. 79, 86."

In McFarland v. American Sugar Refining Co., 241 U. S. 79, 60 L. Ed. 899, 36 S. Ct. R. 498, a statute provided: (p. 81)

"Any person engaged in the business of refining sugar within this state who shall systematically pay in Louisiana a less price for sugar than he pays in any other state shall be prima facie presumed to be a party to a monopoly or combination or conspiracy in restraint of trade and commerce, and upon conviction thereof shall be subject to a fine of $500 a day for the period during which he is adjudged to have done so; his license to do business in the state is to be revoked, and any foreign corporation is to be ousted from the state and its property sold."

The court said (p. 86):

"The presumption created here has no relation

in experience to general facts. It has no foundation except with tacit reference to the plaintiff. **But it is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime.** If the statute had said what it was argued that it means, that the plaintiff's business was affected with a public interest by reason of the plaintiff's monopolizing it, and that therefore the plaintiff should be prima facie presumed guilty **upon proof** that it was carrying on business as it does, we suppose that no one would contend that the plaintiff was given the equal protection of the laws. We agree with the court below that the act must fall as a whole, as it falls in the sections without which there is no reason to suppose that it would have been passed." (Emphasis ours)

The statute involved in the most recent Illinois Filled Milk Act contained the declaration that Filled Milk is an adulterated article of food and its sale constitutes a fraud on the public.

In holding such a law unconstitutional the Supreme Court said:

"Under the law before us, the mixture of any oil or fat other than milk fat with any milk, cream or skimmed milk constitutes conclusive evidence that the resultant product is an adulterated food and if sold the sale is a fraud upon the public, and by Section 3 such sale is made a penal offense. Punishment for selling filled milk is thus based entirely upon the conclusive presumption concerning adulteration and fraud. While the legislature may enact statutes which affect milk and milk products, the application of the statute to a specific case is a judicial function.

By denying vendors such as the plaintiff the right to offer proof with respect to adulteration and fraud the statute deprives them of due process of law and of equal protection of the law. **Weaver v. Palmer Bros. Co., supra; Hovey v. Elliott, 167 U. S. 409; Chicago, Milwaukee and St. Paul Railway Co. v. Minnesota, 134 id. 418; Gillespie v. People,** 188 Ill. 176; **Newland v. Marsh,** 19 id. 376. Furthermore, the statute, in declaring conclusively that the mixture of harmless, healthful food products produces an adulterated food and that its sale is a fraud upon the public, invades the province of the jury."

The Court further said:

"Sec. 2 contains a conclusive assumption as to fraud and adulteration. The legislature does not possess the power to declare what shall be conclusive evidence of a fact, as such a declaration would be an invasion of the power of the judiciary. * * * The legislative department lacks power to declare that to be a fact which everyone knows is not a fact."

If there be no limit or curb upon such legislation then the citizen is at the mercy of the Legislature and special laws and legislative convictions will be in order and the life, liberty and property of minorities may be seized and forfeited by majorities. That this is not an extreme thought is illustrated by the expressions of the Wisconsin Supreme Court.

In **Jaynesville v. Carpenter,** 77 Wis. 288, 46 N. W. 128, where a statute was involved which provided:

"It shall be unlawful and presumptively injurious and dangerous to persons and property to drive

piles, build piers, cribs or other structures—in Rock River within the limits of the County of Rock and the doing of any such act shall be enjoined at the suit of any resident or taxpayer without proof that any injury or danger has been or will be caused by reason of such act."

The court said: (46 N. W. P. 131)

"This is the first time that any legislature of any enlightened country ever attempted to create an action without any cause of action, to authorize a complaint to be made to a court when there is nothing to complain of; to compel the courts to enjoin the lawful use and enjoyment of ones own property without proof that any injury or danger has been or will be caused by reason of such act. * * * (132) It prevents the lawful use of his property. It takes it away from him without compensation or due process of law, and denies the defendant 'the equal protection of the law' * * * It takes his property away from him; and leaves him no remedy whatever by which he can regain it or obtain redress. * * Any restriction or interruption of the common and necessary use of property that destroys its value, or strips it of its attributes, or to say that the owner shall not use his property as he pleases, takes it in violation of the constitution. * * *

"The legislature usurped the judicial power of the courts by the enactment of this statute. It adjudicates an act unlawful and presumptively injurious and dangerous, which is not and cannot be made so without a violation of the constitutional rights of the defendant."

(Citing Ervine's Appeal, 16 Pa. St. 256, the court said:)

"It is said in that case: 'That is not legislation

which adjudicates in a particular case, prescribes the rule contrary to the general law, and orders it to be enforced. Such power assimilates itself more clearly to despotic rule than to any other attribute of government.'

"This statute is discriminating and class legislation in violation of the spirit of our constitution and contrary to the prnciples of civil liberty and natural justice. It gives to a certain class of citizens privileges and advantages which are denied to all others in the state under like circumstances, and subjects one class to losses, damages, suits, or actions from which all others, under like circumstances are exempted. * * * It would be difficult, if not impossible to crowd into so short a statute any more or greater violations of that principle so essential to a free government of 'equal, general and standing laws.'"

* * * "(133) An act of the legislature (for I cannot call it a law) contrary to the great first principles of the social compact cannot be considered a rightful exercise of legislative authority."

In a case where a statute provided that the weights shown by the bill of lading were conclusive evidence that such an amount had been received for shipment, after reviewing decisions of other states the court, in **Missouri, K, and T R. Co. v. Simonson**, 64 Kan. 802, 807, 57 L.R.A. 765, said:

"The theory on which all these cases proceed is that an act of the legislature which undertakes to make a particular fact or matter evidence involving the substantive right of the case conclusive upon the parties, and which precludes inquiry

into the meritorious issues of the controversy, is an invasion of the judicial province and a denial of due process of law. The legislature may regulate the form and the manner of use of the instruments of evidence—the media of proof—but it cannot preclude a party wholly from making his proof. A statute which declares what shall be taken as conclusive evidence of a fact is one which, of course, precludes investigation into the fact, and itself determines the matter in advance of all judicial inquiry. If such statutes can be upheld there is then little use for courts, and small room indeed for the exercise of their functions."

III

THE STATUTE IS INVALID IN THAT THE CLASSIFICATION WHICH IT MAKES IN FORBIDDING THE SHIPMENT IN INTERSTATE COMMERCE OF THE COMPOUND OR MIXTURE OF MILK AND ANIMAL OR VEGETABLE FATS IN THE IMITATION AND SEMBLANCE OF MILK BUT NOT FORBIDDING SUCH TRANSPORTATION OF MIXTURES AND COMPOUNDS OF MILK AND ANIMAL OR VEGETABLE FATS IN IMITATION OR SEMBLANCE OF BUTTER IS ARBITRARY AND UNREASONABLE AND DEPRIVES DEFENDANT OF ITS PROPERTY WITHOUT DUE PROCESS OF LAW.

In a case involving the constitutionality of the Lever Act it was said:

"It seems reasonably clear that the 'due process of law' provision of the 5th amendment is broad enough in its scope and purpose to include the

'equal protection of the laws', which no state may deny to any person under the provisions of the 14th amendment.

"Classification must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without such basis. Arbitrary selection can never be justified by calling it classification. In other words, no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or classes in the same place and in like circumstances."

U. S. v. Yount, 267 Fed. 861, citing **Connolly v. Union Sewer Pipe Co.**, 184 U. S. 540; **Giozza v. Tiernan**, 148 U. S. 657, 13 S. Ct. 721.

The equal protection clause requires that the classification be not arbitrary or unreasonable, but based on real and substantial difference having a reasonable relation to the subject of the particular legislation.

Quaker City Cab Co. v. Philadelphia, 277 U. S. 389, 401, 72 L. Ed. 927, 48 Sup .Ct. Rep. 553.

The Supreme Court of the State of Illinois on the 18th of June, 1931, held the filled milk law of the State of Illinois which prohibited the manufacture, possession or sale of filled milk within the State of Illinois to be unconstitutional, as an arbitrary and unreasonable classification, said:

"* * * It is unreasonable to permit cocoanut oil to be freely used as the principal ingredient of oleomargarine by one manufacturer and prohibit its

use in small proportions by another manufacturer of a food product admitted to be equally wholesome and healthful. No showing is made that such a restriction is justified to protect the public health or to prevent fraud. Section 19½ is arbitrary and unreasonable, and is therefore a void enactment."

In the **Connolly case**, 184 U. S. 540, 46 L. ed. 679, 22 S. Ct. 431, this court was dealing with the Anti-Trust Act of Illinois (Laws 1893 p. 182) condemning trusts or combinations or conspiracies to limit production, prevent competition, and fix prices. Section 9 of the Act provided:

"The provisions of this act shall not apply to agricultural products or live stock while in the hands of the producer or raiser."

In holding the classification to be arbitrary the court said:

"We have seen that under the statute all except producers of agricultural commodities and raisers of live stock, who combine their capital, skill, or acts for any of the purposes named in the act, may be punished as criminals, while argiculturists and live stock raisers, in respect of their products or live stock in hand, are exempted from the operation of the statute, and may combine and do that which, if done by others, would be a crime against the state. The statute so provides notwithstanding persons engaged in trade or in the sale of merchandise and commodities, within the limits of a state, and agriculturists and raisers of live stock, are all in the same general class; that is, they are all alike engaged in domestic trade, which is, of right, open to all, subject to such regulations, applicable alike to all in

like conditions, as the state may legally prescribe."

If persons engaged in the sale or trade of merchandise and commodities and raisers of live stock are in the same general class then surely persons engaged in the manufacture and sale of combinations of milk and fat in the form of oleomargarine and those engaged in the manufacture and sale of the same ingredients in the form of filled milk are in the same class and the latter are entitled to equal protection with the former.

IV

APPELLANT'S BRIEF

APPELLANT HAS SOUGHT TO CONFINE THE APPLICATION OF THE STATUTE TO COMPOUNDS OF "SKIMMED MILK" WHILE, IN FACT, IT RELATES TO COMPOUNDS OF CREAM, MILK, OR SKIMMED MILK IN ANY FORM. SUBSTITUTES FOR EVERY NECESSITY OF LIFE ARE COMMON AND DESIRABLE. VITAMINS ARE SUBJECTS OF CONTROVERSY AND NO STANDARD FOR VITAMINS HAS EVER BEEN ATTEMPTED BY STATUTE. HEBE VS. SHAW IS NOT APPLICABLE TO THE INTERPRETATION OF A FEDERAL LAW AS IT SET A STANDARD FOR STATE NOT FEDERAL STATUTES. THE STATUTE WAS PASSED BY POWERFUL MAJORITIES TO ELIMINATE COMPETITION AND NOT FOR THE PRESERVATION OF THE HEALTH, SAFETY OR COMFORT OF THE PUBLIC:

Appellant's argument is based upon the following propositions:

1. The power of Congress is not limited to the prohibition of the shipment of articles which are noxious in character.

2. Congress has concluded that filled milk is an adulterated article of food, injurious to the public health, and its sale a fraud on the public and that that conclusion is binding upon this court.

   a. Because it is designed as a substitute for milk.

   b. Lack of Vitamin A.

   c. Substitution of cocoanut oil for butter fat makes filled milk identical with evaporated milk in color, consistency and taste.

3. Congress may prohibit the interstate shipment of articles in order to prevent the spread of evils among the states, assuming that filled milk is an evil.

4. That the act does not violate the 5th Amendment, basing this on Hebe v. Shaw, 248 U. S. 297.

5. Filled milk legislation exists in many states.

6. The necessity of such legislation is a debatable question.

7. Since findings of Congress are not without support in fact, the legislative judgment should be sustained.

Appellant seems to have based its argument upon a

misconstruction of the statute. On page 9 of its brief it is said:

> "Filled milk, as defined in the statute and as described in the Committee reports of Congress, is an imitation of condensed or evaporated whole milk made by extracting butter fat from whole milk and substituting therefor a fat such as cocoanut oil."

Appellant seeks to limit the definition to compounds of skimmed milk, while in fact it applies to mixtures with cream, whole milk, and skimmed milk, and evaporated, concentrated, powdered, dried, desiccated, or condensed milk, cream, or skimmed milk, and then only if it resembles some milk product.

In Appellee's product the basic substance is "Skimmed milk," a recognized product, whose shipment or sale is in no way limited. The addition of a wholesome fat is an improvement, not a debasement of the product.

The use of substitutes for articles which are not available because of scarcity, or expense are common everyday experiences. There is scarcely any article used by the human race for which substitutes are not available and desirable.

The excuse for the passage of the Act as shown by the Congressional Committee reports was the lack of Vitamin A in vegetable fats and skimmed milk. Vitamins are so little understood, and the theories of nutritians so constantly changing that no vitamin standard has ever been attempted. For twenty years vitamins, their merits, uses, and sources have been in constant controversy. In

1932 the American Medical Association published a volume called "The Vitamins" being a reprint of the articles submitted by twelve outstanding food authorities. On p. 24 it is said:

> "The functions of vitamin A have been variously stated as growth promoting, infection resisting and antixerophthalmic, although it has been denied by some that this vitamin has any of these functions."

On page 25 the following statement is made:

> "It may be said at the outset that the most familiar form of vitamin A deficiency, xerophthalmia, both of infants and of adults, especially the latter, is extremely rare in the United States. There is good reason to believe that the ordinary food supplies of the major portion of the population of this country furnish enough of this accessory food factor so that there is no tangible evidence of a lack of it."

Again on page 36 the following statement is made:

> "The foods rich in this vitamin, as previously mentioned, are butter, milk, cod liver oil, and vegetables containing green and yellow pigment. That the ordinary American dietary contains foods adequately supplied with this vitamin is attested by the rarity of such diseases in the United States. There is no evidence that the normal person fails to absorb vitamin A or its precursor, carotene."

Each of the State Supreme Courts which have recently considered Filled Milk laws have held that the laws relate in no way to the presence of absence of vitamins.

The fact of similarity of filled milk to other milk products is a natural result. Fats or oils are tasteless and odorless. The taste and odor of all milk products comes from the casein, not from the fat. In every pound of filled milk there is 2½ times the casein that is in whole milk, so that it would be unnatural if it did not taste and smell like milk.

Appellant relies upon the case of Hebe v. Shaw, 248 U. S. 297 to sustain this statute. The statute in that case was not a filled milk law. It was not a prohibitory law. It established a standard for "Condensed milk". Unlike this law it did not recognize skimmed milk or evaporated skimmed milk, and construed filled milk as "condensed milk" deficient in the required amount of fat. This was well and clearly stated by the Michigan Supreme Court in Carolene v. Thompson (supra) where speaking of the Hebe case it said:

> "Its resemblance to this case is quite superficial. It involved a similar milk product, skim milk and oil, but the Court declared the oil was of no consequence. It construed the Ohio statute as prohibiting the sale of condensed skim milk in any form, not merely when mixed with oil. It held the act valid, as against the Federal Constitution, on the ground that it established a standard of nutritive elements for milk and it was designed to save the public from "Fraudulent substitution of an inferior product that would be hard to detect." The Court did not indicate the possibilities of fraud nor the possible ineffectiveness of regulation to conserve the public good.
>
> Its distinctions from this case are quite apparent. The Ohio act, as construed, established a standard of milk for sale, wholly outlawed an inferior

grade of milk but only in manufactured or processed form—condensed skim milk. Our statute is much broader. It established no standard of milk, does not purport to outlaw any kind of milk because it is inferior, is not concerned with whether the product is in manufactured or natural form, but prohibits the sale of any kind of milk, whole or skimmed, and of any milk products whether in natural, manufactured or processed form, and although their sale is otherwise permitted by law, on the single contingency of adding foreign oils also legally salable. With such fundamental differences in the acts, the Hebe case should not be accepted as controlling because of superficial likenesses.

The acceptance of the ruling in the Hebe case, its application to our State Constitution and its extension to the statute at bar, would establish a principle with broad effect upon the rights of citizens, producers, tradesmen and consumers. Regardless of the actual purpose of the instant law, the principle would mean that the legislature may impair, as well as conserve, the market for dairy products, prohibit the manufacture and sale of a wholesome article therefrom and prevent citizens with limited incomes from purchasing a food product they want if, perchance the Court can imagine that the legislature saw a reality or mirage of fraud in the far distance. Extended to other trades, it would enable the legislature to ban many common articles of commerce, such, for example, as syrup not all maple, shoes not all leather, clothes or comfortables with shoddy in them (Weaver v. Palmer, supra) and the like."

The dissenting opinion in the Hebe case is more nearly in harmony with recent judicial thought than the majority

opinion and certainly is the more logical and better reasoned, and appellee begs this court to again read that dissent. That case considered whether a state statute violated the 14th amendment of the United States Constitution and was upheld as proper state legislation but can be no authority for sustaining a Federal statute as a proper exercise by Congress of its power under the Commerce Clause.

The law was passed ostensibly to protect the public health and to prevent fraud and according to the decisions of this Court and the various state courts that have dealt with this particular product it must have some relation to that object.

The appellant has attached to its brief Appendix A being extracts from the congressional committee reports prior to the time of the passage of the act. A brief examination of those reports will show that the act does not, and Congress has made no attempt to, protect health or to protect from fraud but merely sought to eliminate all competition with evaporated milk products by a prohibition of the product and not a regulation of it.

The report states, page 31:

> "The bill proposes to prohibit the manufacture of this compound in the District of Columbia, the Territories and insular possessions."

Every state supreme court that has in recent years passed upon state prohibitory laws have held them void.

The report continues:

"And to prohibit its shipment in interstate commerce."

Notwithstanding the act applies to milk and cream as well as skimmed milk, the report deals entirely with skim milk. It states, page 32:

"The compound can be made more cheaply than the regular article."

Page 33:

"In 1920 nearly eight million pounds of cocoanut fat were used in the manufacture of Filled Milk taking the place of that many pounds of butter fat, injuring the market of the American farmers and bringing his product in competition with a decidedly inferior product. * * * it is put up in the same sized cans as regular condensed milk."

Page 35:

"No reason is perceived by the committee why an exact imitation of or substitute for this article should be permitted to be sold to the public which does not meet these requirements."

(The standard of evaporated milk.)

Page 37:

"The committee is of the opinion that the traffic of the article should be stopped now * * * before serious damage is done to the dairy industry."

Page 38:

"Instead of vast quantities of whole milk being

condensed, the butter fat must be extracted and turned into a competitive oversupply of butter."

Page 39:

"If Congress or the several states does not do something to stop this competition * * *."

Page 43:

"While the proposed bill will not prohibit the manufacture and sale of the compound within the limits of a state, the committee is of opinion that a law prohibiting interstate shipment will suppress it. * * * Because a sufficient milk supply cannot be found in many states which would warrant engaging in the enterprise."

Page 48:

"What is filled milk? It is a compound of skimmed milk and cocoanut oil."

(No mention is made of the fact that under the statute it is also whole milk and cream combined with any fat other than milk fat.)

Page 49:

"The compound can be manufactured for less than half of the cost of evaporated milk." A table shows the production of 296,741,658 pounds from 1916 to 1921.

Page 51:

"Our chief source of the vitamins is milk and the vitamins are found almost wholly in the butter fat of milk."

(This court knows that as a matter of fact all of the vitamins B, C and G of milk remain in the skimmed milk and that as to Vitamin A milk is of comparatively low Vitamin A content.)

Page 52:

"Milk is the one chief food of the nation and no adulteration of it or substitution for it should be permitted."

Page 53:

"There are cases in which whole cows milk is not acceptable to an infant and where it has been found that compounds of skimmed milk, cocoanut oil, cod-liver oil (rich in vitamins) and other ingredients may be more acceptable."

Page 54:

"There is no claim that the compound in and of itself is unwholesome. * * * the claim that an additional market is found by the manufacture of this compound for the farmers skimmed milk is not well founded. Even if this claim could be substantiated it would in the judgment of the committee be no justification for its manufacture." (Could it be any ground for its prohibition and suppression?) "* * * Moreover opponents of the measure were unable to demonstrate to the committee any uses of the compounds which were different from or additional to the uses of whole milk." (Is this a ground for suppression?)

Page 55:

"The value of 100 pounds of skim milk was shown

to be from 35 to 50 cents while the value of 4 pounds of cocoanut oil would be approximately 48 cents and the value of four pounds of butter fat would be approximately $1.72 * * * There is no purpose for which Filled Milk is used where evaporated or condensed milk will not do as well or better."

Page 57:

"It is reasonable to assume that in the absence of state legislation and campaigns or education conducted in respect to the compound its sale would now run into hundreds of millions of pounds per year."

Page 58:

"* * * We cannot afford to let a few manufacturers in this country for an additional profit to them strike a blow which will do irreparable injury to out entire dairy industry."

Attention is invited to the minority view of the Committee on Agriculture as set out on pages 44 and 45 of Appellant's brief. If as stated there the proponents of the law agreed that a product "composed of skimmed milk and vegetable oil is not unwholesome, deleterious or injurious to health, but a wholesome and nutritious food," there could have been no debatable question then, neither is there now, that there is anything harmful about the product, and that it cannot be, "an agency to promote immorality, dishonesty, or the spread of any evil or harm." The majority report (P. 54) admits: "There is no claim that the compound in and of itself is unwholesome."

Mention is made in appellant's brief (p. 10) of the recent decision of the Circuit Court of Appeals for the 7th Circuit, Carolene v. Evaporated Milk Assn. This case brought by Appellee herein, sought to enjoin the Evaporated Milk Association from continuing a conspiracy to restrain its interstate trade in Carolene and Milnut, alleging that this organization was a conspiracy under the anti-trust laws of the United States, restraining appellee's trade by the circulation of false propaganda, causing the passage of prohibitory laws against appellee's products, and hiring lawyers and witnesses to oppose appellee in cases to which neither the Association nor its members were parties. The Association admitted this but contended appellee had no standing in a court of equity because of the law here involved. The court upheld this view, and refused to deal with the conspiracy charge, but without brief, argument or evidence wrote a lengthy opinion sustaining the constitutionality of the Federal Act. If that case shows anything it shows the reason for the existence of this act to be what was described in Adams v. Tanner as "skillfully directed agitation" by competitors.

Appendix B of appellant's brief purports to give the status of filled milk legislation in the various states. It neglects, however, to state that the enforcement of the statute of Alabama has been enjoined at the instance of appellee which is also true with the statute of the states of Iowa, Missouri, Virginia and West Virginia. It also neglects to state that the statute of Pennsylvania which was upheld in the case of Carolene Products Company v. Harter was a statute regulating the size of cans and labels to be used and not a statute prohibiting the manufacture or sale of a skimmed milk compound. It further neglects to state that the case of State v. Emery,

178 Wis. 147, has been overruled in every point by a more recent decision of that case Jelke v. Emery 193 Wis.

CONCLUSION

Appellee, therefore, submits that the judgment of the District Court, sustaining the demurrer should be sustained.

Disregarding the reports of Congressional Committees and facts in State decisions, this law on its face shows it to be an usurpation of State authority by Congress, under the guise of a regulation of Commerce; that it is a prohibition and not a regulation; that the fact that a food resembles a milk product is not proper reason for its prohibition; and that the statute denies a defendant indicted under its terms the right to present evidence of adulteration, healthfulness or fraud and usurps the power of the court and the jury.

Respectfully submitted,
CAROLENE PRODUCTS COMPANY,
By George N. Murdock, Counsel.

In The
CIRCUIT COURT OF SANGAMON COUNTY,
ILLINOIS

Carolene Products Company, Plaintiff,
v.
Walter W. McLaughlin, Director, etc., Defendant.

Chan. No. 67032.
Unpublished.

This is a complaint for injunction to restrain defendant from enforcing against plaintiff an act of July 10, 1935, commonly known as the "Filled Milk" statute on the ground that said Statute is unconstitutional and void because it deprives plaintiff of its property without due process of law and deprives it of the equal protection of the law and because it is special legislation and discriminatory.

The statute in question is as follows:

"19c. 'Filled milk' defined). S. 19a. The term 'filled milk' means any milk, cream or skimmed milk, whether or not condensed, evaporated, concentrated or desiccated, or any of the fluid derivatives of them, to which has been added any fat or oil other than milk fat. This definition shall not include any milk from which no part of the milk fat has been extracted, whether or not condensed, evaporated, concentrated or desiccated, to which has been added any substance rich in vitamins, nor any distinctive proprietary food compound not readily mistaken for milk or cream or for evaporated, condensed, concentrated or desiccated milk or cream, provided such compound (1) is pre-

pared and designed for the feeding of infants or young children and customarily used on the order of a physician; (2) is packed in individual cans containing not more than sixteen and one-half (16½) ounces of the article, bearing a label in bold type that the contents are to be used only for said purpose.

"19d. (Sale of filled milk declared fraud.) S. 19b. 'Filled milk' as herein defined, is an adulterated food and its sale constitutes a fraud upon the public.

"19e. Manufacture and sale of filled milk prohibited.) S. 19c. It shall be unlawful for any person, by himself, his servant or agent, or as the servant or agent of another, to manufacture for sale within this State or sell or exchange, or have in his possession with intent to sell or exchange, any 'filled milk', as defined in this Act."

These sections repealed and replaced **Section 19½ of Chapter 56½, Smith-Hurd's R. S. 1929,** which was declared unconstitutional by our Supreme Court in **People v. Carolene Products Company,** 345 Ill. 166. That Statute was as follows:

"No person shall manufacture, sell or exchange, or have in possession with intent to sell or exchange, any milk, cream, skim milk, buttermilk, condensed or evaporated milk, powdered milk condensed skim milk or any of the fluid derivatives of, any of them to which has been added any fat or oil other than milk fat, either under the name of said products or articles or the derivatives thereof or under any fictitious or trade name whatsoever."

The issue here is arrived at by allegations and denials of material facts which are not here recited. The parties hereto for whose benefit this memorandum is prepared are perfectly familiar with the pleadings.

Plaintiff's evidence showed that the product was manufactured by taking sweet milk from which substantially all the butter fat had been removed by the ordinary process of separation, evaporating it to a little more than half its volume, and adding thereto not less than 6% fresh, sweet, refined coconut oil. It was then packed in air-tight cans, sterilized and packed in cases. The plaintiff sells the product throughout the State through jobbers. The only advertising done by plaintiff consisted of some cardboard window sings, a recipe book, an advertising mat prepared for use of retailers in advertising; said mat showing an exact reproduction of the can and front part of the label with the words:

> "Science's contribution to the art of good living—MILNUT. So rich it whips. Costs no more and gives better results than ordinary evaporated milk. A blend —evaporated;"

and a circular notifying dealers that the product was to be sold only under the trade name and not as evaporated milk. The labels, introduced in evidence, show in two places that the product is a compound, the ingredients, refined nut oils and evaporated skimmed milk and shows the proportions of each; it shows the intended uses "for coffee, baking and other culinary purposes" and a statement that it is "not to be sold for evaporated milk".

It was shown that coconut oil is one of the leading food fats in actual use in the United States, the use being

approximately four pounds per capita, and is the principal constituent of oleomargarine, which product alone uses over 140 million pounds annually, that it is extensively used in shortening, candies, wafers, crackers and as a covering for salted nuts and crackers, the reason for its superiority being that it does not get rancid as quickly as butter fat, hence the product remains sweet after opening, longer than ordinary evaporated milk. It was shown that the skimmed milk content contains all of the proteins, carbohydrates and minerals of whole milk to an extent of about 2¼ times whole milk and all of the vitamins found in evaporated milk except vitamin A, and that as a producer of energy coconut oil was equivalent in every way to butter fat. It was shown that the valuable vitamins B and G which are water soluble were retained in a similarly increased proportion. It was shown that vitamins B and G are the vitamins which prevent beri-beri and pellagra, and that their uses are regulation of appetite and digestion, prevent paralysis, heart trouble, ailments of the digestive system, etc. It was shown that vitamin A is one of the most common vitamins and is readily supplied by other foods, one egg yolk containing as much of the vitamin as a quart of milk, a half teaspoon of spinach as much as a cup of milk, while one tablespoon of cod liver oil contains as much as eleven cups of milk. It was further shown that vitamin A is entirely lacking in many of the best known and commonly used foods, such as white bread, sugar, molasses, raisins and corn starch. Well qualified experts testified to the uses and wholesomeness of both coconut oil and skim milk and that was nothing in either of them or a combination of them that was in any way deleterious to health.

Defendant introduced an expert who testified as to

a test designed to show the presence of vitamin A in Milnut, Carolene and evaporated milk. The test showed that there was ten times as much vitamin A in evaporated milk as in the compounds. Plaintiff's expert testified to an even smaller amount. It was testified, however, that if an amount of cod liver oil one-half as large as a pin head had been added to the daily ration of each rat fed on Milnut the vitamin A content would have equaled that of the evaporated milk ration. It was shown by medical testimony that evaporated milk contained no vitamin C and that for infant feeding it was necessary to supplement evaporated milk or whole milk with foods rich in vitamin C and that infant foods made of vegetable oils and milk from which some or all of the fat had been removed were common on the market and that even plaintiff's product if properly supplemented might be satisfactory for such feeding.

Defendant introduced testimony of witnesses who purchased Milnut from retail grocers in Chicago and that when they asked for the cheapest evaporated milk they were sometimes handed Milnut, sometimes told that the grocer had Milnut, and sometimes the witnesses had to inquire about Milnut before producing it. A summary of the evidence shows that there were ample evidence that the products are nutritious, healthful, wholesome foods and in no way deleterious to health. The labels speak the truth. There is no evidence that any person was in any way deceived, defrauded or injured by its purchase or use.

By the evidence above quoted it seems clear to the Court that it should regard the product of plaintiff as was regarded by the Supreme Court in the **Carolene Products Co. case, supra,** under the stipulation, not harmful or

deleterious to health in any way and its possession in no way dangerous to the public, and I may further say its sale in no way dangerous to the public. In that regard the case at bar is parallel to the Carolene case referred to. It is obvious, therefore, that to maintain the Statute it must be upon the theory of that which defendant claims was not adjudicated in the above case, namely, the question of imitation or deceit involved, if any.

The Court in that case had submitted to it practically all of the authorities relied upon by defendant here, and each of those cases was distinguished as shown by the opinion referred to. After the analysis of those cases and notwithstanding them, the Court concludes its opinion as follows:

> "Under the facts admitted in this case the legislature has exceeded its constitutional power in enacting the law in question. It is admitted that Carolene is not poisonous or explosive and that it does not injuriously affect the health, safety or welfare of the people. Coconut oil is admitted to be a healthful substance and is the principal ingredient of oleomargarine. It is unreasonable to permit coconut oil to be freely used as the principal ingredient of oleomargarnie by one manufacturer and prohibit its use in smaller proportions by another manufacturer of a food product admitted to be equally wholesome and healthful. 'No showing is made that such a restriction is justified to protect the public health or to prevent fraud. Section 19½ is arbitrary and unreasonable, and is therefore a void enactment."

We shall now consider those questions which defend-

ant says were not adjudicated by the Supreme Court in the Carolene case, supra.

There is no evidence in the record that anyone has been deceived into the belief that this product was condensed milk except in a few isolated cases, and the officers of plaintiff made diligent efforts to prevent that thing. The wrappers on the cans expose what the product is and there is nothing about those wrappers tending to deceive the trade that the contents of the can are milk. There is nothing about the product and its sale and distribution which make the product "apt" to deceive or msilead. It would be an unreasonable expansion of the admittedly broad police powers of the State to say that this product calls for an exercise of those powers in order to suppress the sale and distribution thereof on account of imitation, deception and fraud.

This act is subject to another serious objection. It would take from me, for example, the power to hear and determine as I have attempted to do above, whether this product is adulterated or whether its manufacture and sale is a fraud. It has attempted to establish a conclusive presumption that it is adulterated and that it is a fraud. In People v. Rose, 207 Ill. 352, the Court said:

> "It is not, however, within the legislative power to declare what shall be conclusive evidence as that would be invasion of the power of the judiciary. (People v. Falk, 310 Ill. 282; People v. Love, 310 Ill. 558."

This Statute is a penal Statute, punishing the manufacture or sale of "filled milk," but this punishment is

based entirely upon the conclusive presumption which makes the question of adulteration and fraud res adjudicata and deprives the plaintiff of its right to offer proof with respect thereto before a Court under the process of law. This the Legislature has no power to do. (Chicago, Milwaukee & St. Paul R. R. v. Minnesota, 134 U. S. 418; Newland v. Marsh, 19 Ill. 376; Hovey v. Elliott, 167 U. S. 407; Gillespie v. People, 188 Ill. 176; State v. Jullow, 119 Mo. 163.)

This Act not only states a conclusive presumption intended to be binding upon Courts and everybody else, but it contravenes another act of the legislature which defines adulteration, and it appears from the evidence that plaintiff's compound is not adulterated thereunder.

Other questions are raised on this record and argued at length and ably, but it seems to me that a serious consideration of the above and foregoing must inevitably lead to the conclusion that the Act under examination is without the power of the Legislature under the Constitution, and is therefore void.

It follows that I am of the opinion that the equities in this case are with the plaintiff and that the temporary injunction heretofore issued should be and it is hereby made permanent.

Lawrence E. Stone,
Judge.

pp. 4, 5, 7.

SUPREME COURT OF THE UNITED STATES.

No. 640.—October Term, 1937.

The United States of America, Appellant, vs. Carolene Products Company.	Appeal from the District Court of the United States for the Southern District of Illinois.

[April 25, 1938.]

Mr. Justice Stone delivered the opinion of the Court.

The question for decision is whether the "Filled Milk Act" of Congress of March 4, 1923 (c. 262, 42 Stat. 1486, 21 U. S. C. §§ 61-63),[1] which prohibits the shipment in interstate commerce of skimmed milk compounded with any fat or oil other than milk fat, so as to resemble milk or cream, transcends the power of Congress to regulate interstate commerce or infringes the Fifth Amendment.

Appellee was indicted in the district court for southern Illinois for violation of the Act by the shipment in interstate commerce of certain packages of "Milnut", a compound of condensed skimmed milk and coconut oil made in imitation or semblance of condensed milk or cream. The indictment states, in the words of the statute, that Milnut "is an adulterated article of food, injurious to the public health," and that it is not a prepared food product of the type excepted from the prohibition of the Act. The trial court sustained a demurrer to the indictment on the authority of an earlier case in the same court, *United States* v. *Carolene Products*

[1] The relevant portions of the statute are as follows:

"Section 61. . . . (c) The term 'filled milk' means any milk, cream, or skimmed milk, whether or not condensed, evaporated, concentrated, powdered, dried, or desiccated, to which has been added, or which has been blended or compounded with, any fat or oil other than milk fat, so that the resulting product is in imitation or semblance of milk, cream, or skimmed milk, whether or not condensed, evaporated, concentrated, powdered, dried, or desiccated. . . .

"Section 62. . . . It is hereby declared that filled milk, as herein defined, is an adulterated article of food, injurious to the public health, and its sale constitutes a fraud upon the public. It shall be unlawful for any person to . . . ship or deliver for shipment in interstate or foreign commerce, any filled milk."

Section 63 imposes as penalties for violations "a fine of not more than $1,000 or imprisonment of not more than one year, or both . . ."

Co., 7 Fed. Supp. 500. The case was brought here on appeal under the Criminal Appeals Act of March 2, 1937, 34 Stat. 1246, 18 U. S. C. § 682. The Court of Appeals for the Seventh Circuit has meanwhile, in another case, upheld the Filled Milk Act as an appropriate exercise of the commerce power in *Carolene Products Co.* v. *Evaporated Milk Ass'n*, 93 F. (2d) 202.

Appellee assails the statute as beyond the power of Congress over interstate commerce, and hence an invasion of a field of action said to be reserved to the states by the Tenth Amendment. Appellee also complains that the statute denies to it equal protection of the laws and, in violation of the Fifth Amendment, deprives it of its property without due process of law, particularly in that the statute purports to make binding and conclusive upon appellee the legislative declaration that appellee's product "is an adulterated article of food injurious to the public health and its sale constitutes a fraud on the public."

First. The power to regulate commerce is the power "to prescribe the rule by which commerce is to be governed", *Gibbons* v. *Ogden*, 9 Wheat. 1, 196, and extends to the prohibition of shipments in such commerce. *Reid* v. *Colorado*, 187 U. S. 137; *Lottery Case*, 188 U. S. 321; *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366; *Hope* v. *United States*, 227 U. S. 308; *Clark Distilling Co.* v. *Western Maryland R. Co.*, 242 U. S. 311; *United States* v. *Hill*, 248 U. S. 420; *McCormick & Co., Inc.* v. *Brown*, 286 U. S. 131. The power "is complete in itself, may be exercised to its utmost extent and acknowledges no limitations other than are prescribed by the Constitution." *Gibbons* v. *Ogden, supra*, 196. Hence Congress is free to exclude from interstate commerce articles whose use in the states for which they are destined it may reasonably conceive to be injurious to the public health, morals or welfare, *Reid* v. *Colorado, supra; Lottery Case, supra; Hipolite Egg Co.* v. *United States*, 220 U. S. 45; *Hope* v. *United States, supra*, or which contravene the policy of the state of their destination. *Kentucky Whip & Collar Co.* v. *Illinois Central R. Co.*, 299 U. S. 334. Such regulation is not a forbidden invasion of state power either because its motive or its consequence is to restrict the use of articles of commerce within the states of destination, and is not prohibited unless by the due process clause of the Fifth Amendment. And it is no objection to the exertion of the power

to regulate interstate commerce that its exercise is attended by the same incidents which attend the exercise of the police power of the states. *Seven Cases* v. *United States*, 239 U. S. 510, 514; *Hamilton* v. *Kentucky Distilleries & Warehouse Co.*, 251 U. S. 146, 156. The prohibition of the shipment of filled milk in interstate commerce is a permissible regulation of commerce, subject only to the restrictions of the Fifth Amendment.

Second. The prohibition of shipment of appellee's product in interstate commerce does not infringe the Fifth Amendment. Twenty years ago this Court, in *Hebe Co.* v. *Shaw*, 248 U. S. 297, held that a state law which forbids the manufacture and sale of a product assumed to be wholesome and nutritive, made of condensed skimmed milk, compounded with coconut oil, is not forbidden by the Fourteenth Amendment. The power of the legislature to secure a minimum of particular nutritive elements in a widely used article of food and to protect the public from fraudulent substitutions, was not doubted; and the Court thought that there was ample scope for the legislative judgment that prohibition of the offending article was an appropriate means of preventing injury to the public.

We see no persuasive reason for departing from that ruling here, where the Fifth Amendment is concerned; and since none is suggested, we might rest decision wholly on the presumption of constitutionality. But affirmative evidence also sustains the statute. In twenty years evidence has steadily accumulated of the danger to the public health from the general consumption of foods which have been stripped of elements essential to the maintenance of health. The Filled Milk Act was adopted by Congress after committee hearings, in the course of which eminent scientists and health experts testified. An extensive investigation was made of the commerce in milk compounds in which vegetable oils have been substituted for natural milk fat, and of the effect upon the public health of the use of such compounds as a food substitute for milk. The conclusions drawn from evidence presented at the hearings were embodied in reports of the House Committee on Agriculture, H. R. No. 365, 67th Cong., 1st Sess., and the Senate Committee on Agriculture and Forestry, Sen. Rep. No. 987, 67th Cong., 4th Sess. Both committees concluded, as the statute itself declares, that the use of filled milk as a substitute

for pure milk is generally injurious to health and facilitates fraud on the public.[2]

There is nothing in the Constitution which compels a legislature, either national or state, to ignore such evidence, nor need it disregard the other evidence which amply supports the conclusions of the Congressional committees that the danger is greatly enhanced where an inferior product, like appellee's, is indistinguishable from a valuable food of almost universal use, thus making fraudulent distribution easy and protection of the consumer difficult.[3]

Here the prohibition of the statute is inoperative unless the product is "in imitation or semblance of milk, cream, or skimmed

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[2] The reports may be summarized as follows: There is an extensive commerce in milk compounds made of condensed milk from which the butter fat has been extracted and an equivalent amount of vegetable oil, usually coconut oil, substituted. These compounds resemble milk in taste and appearance and are distributed in packages resembling those in which pure condensed milk is distributed. By reason of the extraction of the natural milk fat the compounded product can be manufactured and sold at a lower cost than pure milk. Butter fat, which constitutes an important part of the food value of pure milk, is rich in vitamins, food elements which are essential to proper nutrition and are wanting in vegetable oils. The use of filled milk as a dietary substitute for pure milk results, especially in the case of children, in undernourishment, and induces diseases which attend malnutrition. Despite compliance with the branding and labeling requirements of the Pure Food and Drugs Act, there is widespread use of filled milk as a food substitute for pure milk. This is aided by their identical taste and appearance, by the similarity of the containers in which they are sold, by the practice of dealers in offering the inferior product to customers as being as good as or better than pure condensed milk sold at a higher price, by customers' ignorance of the respective food values of the two products, and in many sections of the country by their inability to read the labels placed on the containers. Large amounts of filled milk, much of it shipped and sold in bulk, are purchased by hotels and boarding houses, and by manufacturers of food products, such as ice cream, to whose customers labeling restrictions afford no protection.

[3] There is now an extensive literature indicating wide recognition by scientists and dietitians of the great importance to the public health of butter fat and whole milk as the prime source of vitamins, which are essential growth producing and disease preventing elements in the diet. See Dr. Henry C. Sherman, *The Meaning of Vitamin A*, in *Science*, Dec. 21, 1928, p. 619; Dr. E. V. McCollum et al., *The Newer Knowledge of Nutrition* (1929 ed.), pp. 134, 170, 176, 177; Dr. A. S. Root, *Food Vitamins* (N. Car. State Board of Health, May 1931), p. 2; Dr. Henry C. Sherman, *Chemistry of Food and Nutrition* (1932), p. 367, Dr. Mary S. Rose, *The Foundations of Nutrition* (1933), p. 237.

When the Filled Milk Act was passed, eleven states had rigidly controlled the exploitation of filled milk, or forbidden it altogether. H. R. 365, 67th Cong., 1st Sess. Some thirty-five states have now adopted laws which in terms, or by their operation, prohibit the sale of filled milk. Ala. Agri. Code, 1927, § 51, Art. 8; Ariz. Rev. Code, [illegible] Pope's Ark. Dig. 1937, § 3103; Deering's Cal. Code, 1933 Supp., Tit. 149, Act 1943, p. 1302; Conn. Gen. Stat., 1930, § 2487, c. 135; Del. Rev. Code, 1935, § 649; Fla. Comp. Gen. Laws, 1927, §§ 3216, 7676; Ga. Code, 1933, § 42-511; Idaho Code, 1932, tit. 36, §§ 502-504; Jones Ill. Stat. Ann., [illegible] Supp., § 53.020 (1), (2), (3); Burns Ind. Stat., [illegible] Iowa Code, 1935, § 3062; Kan. Gen. Stat., 1935, c. 65, § 707; Md. Ann. Code, § 281; Mass. Ann. Laws, [illegible] § 17-A, c. 94; 1933, § 35-1203; Art. 27, 1937 1933, 1936 Supp., § 9434;

milk, whether or not condensed". Whether in such circumstances the public would be adequately protected by the prohibition of false labels and false branding imposed by the Pure Food and Drugs Act, or whether it was necessary to go farther and prohibit a substitute food product thought to be injurious to health if used as a substitute when the two are not distinguishable, was a matter for the legislative judgment and not that of courts. *Hebe Co.* v. *Shaw, supra; South Carolina* v. *Barnwell Bros. Inc.*, No. 161, this term, decided February 14, 1938. It was upon this ground that the prohibition of the sale of oleomargarine made in imitation of butter was held not to infringe the Fourteenth Amendment in *Powell* v. *Pennsylvania*, 127 U. S. 678; *Capital City Dairy Co.* v. *Ohio*, 183 U. S. 238. Compare *McCray* v. *United States*, 195 U. S. 27, 63; *Purity Extract and Tonic Co.* v. *Lynch*, 226 U. S. 192.

Appellee raises no valid objection to the present statute by arguing that its prohibition has not been extended to oleomargarine or other butter substitutes in which vegetable fats or oils are substituted for butter fat. The Fifth Amendment has no equal protection clause, and even that of the Fourteenth, applicable only to the states, does not compel their legislatures to prohibit all like evils, or none. A legislature may hit at an abuse which it has found, even though it has failed to strike at another. *Central Lumber Co.* v. *South Dakota*, 226 U. S. 157, 160; *Miller* v. *Wilson*, 236 U. S. 373, 384; *Hall* v. *Geiger-Jones Co.*, 242 U. S. 539, 556; *Farmers and Merchants Bank* v. *Federal Reserve Bank*, 262 U. S. 649, 661.

Third. We may assume for present purposes that no pronouncement of a legislature can forestall attack upon the constitutionality of the prohibition which it enacts by applying opprobrious epithets to the prohibited act, and that a statute would deny due process which precluded the disproof in judicial proceedings of

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Mich. Comp. Laws, 1929, § 5358; Mason's Minn. Stat., 1927, § 3926; Mo. Rev. Stat., 1929, §§ 12408-12413; Mont. Rev. Code, Anderson and McFarland, 1935, c. 240, § 2620.39; Neb. Comp. Stat., 1929, § 81-1022; N. H. Pub. L. 1926, v. 1, c. 163, § 37, p. 619; N. J. Comp. Stat., 1911-1924, § [illegible], p. 1400; Cahill's N. Y. Cons. Laws, 1930, § 60, c. 1; N. D. Comp. Laws, 1913-1925, c. 38, § 2855(a) 1; Page's Ohio Gen. Code, § 12725; Purdon's Penna. Stat., 1936, Tit. 31, §§ 553, 582; S. D. Comp. Laws, 1929, c. 192, § [illegible]-0, p. 2493; Williams Tenn. Code, 1934, c. 15, §§ 6549, 6551; Vernon's Tex. Pen. Code, Tit. 12, c. 2, Art. [illegible]; Utah Rev. Stat., 1933, [illegible]; Vt. Pub. L., 1933, Tit. 34, c. 303, § 7724, p. 1288; Va. [illegible]; W. Va. 1932 Code, § 2036; Wis. Stat., 11th Ed. 1931, c. 98, § 98.07, p. [illegible]; cf. N. Mex. Ann. Stat., 1929, [illegible]. Three others have subjected its sale to rigid regulations. Colo. L. 1921, c. 30, § 1007, p. 440; Ore. 1930 Code, v. 2, c. XII, [illegible]; Remington's Wash. Rev. Stat., v. 7, Tit. 40, c. 13, §§ 6206, 6207, 6713, 6714, p. 360.

all facts which would show or tend to show that a statute depriving the suitor of life, liberty or property had a rational basis.

But such we think is not the purpose or construction of the statutory characterization of filled milk as injurious to health and as a fraud upon the public. There is no need to consider it here as more than a declaration of the legislative findings deemed to support and justify the action taken as a constitutional exertion of the legislative power, aiding informed judicial review, as do the reports of legislative committees, by revealing the rationale of the legislation. Even in the absence of such aids the existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.[4] See *Metropolitan Casualty Ins. Co.* v. *Brownell*, 294 U. S. 580, 584, and cases cited. The present statutory findings affect appellee no more than the reports of the Congressional committees and since in the absence of the statutory findings they would be presumed, their incorporation in the statute is no more prejudicial than surplusage.

Where the existence of a rational basis for legislation whose constitutionality is attacked depends upon facts beyond the sphere of judicial notice, such facts may properly be made the subject of judicial inquiry, *Borden's Farm Products Co.* v. *Baldwin*, 293 U. S. 194, and the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist. *Chastleton Corporation* v. *Sinclair*, 264 U. S. 543. Similarly we recognize that the constitutionality of a statute, valid on its face, may be assailed by proof of facts tending to show that the statute as ap-

[4] There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth. See Stromberg v. California, 283 U. S. 359, 369-370; Lovell v. Griffin, No. 391 this term, decided March 28, 1938, pamp. p. 5.

It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. On restrictions upon the right to vote, see Nixon v. Herndon, 273 U. S. 536; Nixon v. Condon, 286 U. S. 73; on restraints upon the dissemination of information, see Near v. Minnesota, 283 U. S. 697, 713-

plied to a particular article is without support in reason because the article, although within the prohibited class, is so different from others of the class as to be without the reason for the prohibition, *Railroad Retirement Board* v. *Alton R. Co.*, 295 U. S. 330, 349, 351, 352; see *Whitney* v. *California*, 274 U. S. 357, 379; cf. *Morf* v. *Bingaman*, 298 U. S. 407, 413, though the effect of such proof depends on the relevant circumstances of each case, as for example the administrative difficulty of excluding the article from the regulated class. *Carmichael* v. *Southern Coal & Coke Co.*, 301 U. S. 495, 511-512; *South Carolina* v. *Barnwell Bros., Inc.*, No. 161 this term, decided February 14, 1938, pamp. p. 10. But by their very nature such inquiries, where the legislative judgment is drawn in question, must be restricted to the issue whether any state of facts either known or which could reasonably be assumed affords support for it. Here the demurrer challenges the validity of the statute on its face and it is evident from all the considerations presented to Congress, and those of which we may take judicial notice, that the question is at least debatable whether commerce in filled milk should be left unregulated, or in some measure restricted, or wholly prohibited. As that decision was for Congress, neither the finding of a court arrived at by weighing the evidence, nor the verdict of a jury can be substituted for it. *Price* v. *Illinois*, 238 U. S. 446, 452; *Hebe Co.* v. *Shaw*, *supra*, 303; *Standard Oil Co.* v. *Marysville*, 279 U. S. 582, 584; *South Carolina* v. *Barnwell Bros., Inc.*, *supra*, —, citing *Worcester County Trust Co.* v. *Riley*, 302 U. S. —, —.

The prohibition of shipment in interstate commerce of appellee's product, as described in the indictment, is a constitutional exercise

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714, 718-720, 722; Grosjean v. American Press Co., 297 U. S. 233; Lovell v. Griffin, *supra*; on interferences with political organizations, see Stromberg v. California, *supra*, 369; Fiske v. Kansas, 274 U. S. 380; Whitney v. California, 274 U. S. 357, 373-378; Herndon v. Lowry, 301 U. S. 242; and see Holmes, J., in Gitlow v. New York, 268 U. S. 652, 673; as to prohibition of peaceable assembly, see De Jonge v. Oregon, 299 U. S. 353, 365.

Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, Pierce v. Society of Sisters, 268 U. S. 510, or national, Meyer v. Nebraska, 262 U. S. 300; Bartels v. Iowa, 262 U. S. 404; Farrington v. Tokushige, 273 U. S. 484, or racial minorities. Nixon v. Herndon, *supra*; Nixon v. Condon, *supra*: whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry. Compare McCulloch v. Maryland, 4 Wheat. 316, 428; South Carolina v. Barnwell Bros., No. 161 this term, decided February 14, 1938, n. 2, and cases cited.

of the power to regulate interstate commerce. As the statute is not unconstitutional on its face the demurrer should have been overruled and the judgment will be

Reversed.

Mr. Justice BLACK concurs in the result and in all of the opinion except the part marked *"Third."*

Mr. Justice MCREYNOLDS thinks that the judgment should be affirmed.

Mr. Justice CARDOZO and Mr. Justice REED took no part in the consideration or decision of this case.

Mr. Justice BUTLER.

I concur in the result. Prima facie the facts alleged in the indictment are sufficient to constitute a violation of the statute. But they are not sufficient conclusively to establish guilt of the accused. At the trial it may introduce evidence to show that the declaration of the Act that the described product is injurious to public health and that the sale of it is a fraud upon the public are without any substantial foundation. *Mobile, J. & K. C. R. R.* v. *Turnipseed,* 219 U. S. 35, 43. *Manley* v. *Georgia,* 279 U. S. 1, 6. The provisions on which the indictment rests should if possible be construed to avoid the serious question of constitutionality. *Fed. Trade Comm.* v. *Amer. Tobacco Co.,* 264 U. S. 298, 307. *Panama R. R. Co.* v. *Johson,* 264 U. S. 375, 390. *Missouri Pac. R. R.* v. *Boone,* 270 U. S. 466, 472. *Richmond Co.* v. *United States,* 275 U. S. 331, 346. If construed to exclude from interstate commerce wholesome food products that demonstrably are neither injurious to health nor calculated to deceive, they are repugnant to the Fifth Amendment. *Weaver* v. *Palmer Bros. Co.,* 270 U. S. 402, 412-13. See *People* v. *Carolene Products Co.,* 345 Ill. 166. *Carolene Products Co.* v. *McLaughlin,* 365 Ill. 62. *Carolene Products Co.* v. *Thompson,* 276 Mich. 172. *Carolene Products Co.* v. *Banning,* 121 Neb. 429. The allegation of the indictment that Milnut "is an adulterated article of food, injurious to the public health," tenders an issue of fact to be determined upon evidence.